EDITOR'S NOTE

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tatus: GRANTED

ocketed:
ugust 29, 1986

Title: Fort Halifax Packing Company, Inc., Appellant
v.
P. Daniel Coyne, Director, Bureau of Labor Standards of Maine, et al.

Court: Supreme Judicial Court of Maine

Counsel for appellant: Yavis Jr.,John C.

Counsel for appellee: Warren,Thomas D.

ntry	Date	Note	Proceedings and Orders
1	Aug 29 1986	G	Statement as to jurisdiction filed.
2	Aug 29 1986		Appendix of appellant Ft. Halifax Packing Co., Inc. filed.
4	Sep 12 1986		Order extending time to file response to jurisdictional statement until October 16, 1986.
5	Sep 12 1986		The above extension applies to all respondents.
7	Oct 14 1986		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
8	Oct 16 1986		Motion of appellee P. Daniel Coyne, Dir., etc. to dismiss or affirm filed.
9	Oct 22 1986		DISTRIBUTED. November 7, 1986
10	Oct 28 1986	X	Reply brief of appellant Ft. Halifax Packing Co., Inc. filed.
11	Nov 10 1986		PROBABLE JURISDICTION NOTED. **
12	Dec 12 1986		Record filed.
13	Dec 12 1986		Certified copy of original rercord (Box) received.
14	Dec 29 1986		Brief amicus curiae of United States filed.
15	Dec 29 1986		Brief amicus curiae of Chamber of Commerce of the U.S filed.
16	Jan 2 1987		Brief of appellant Ft. Halifax Packing Co., Inc. filed.
17	Jan 7 1987		Joint appendix filed.
18	Jan 8 1987	D	Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Jan 13 1987	D	Motion of Chamber of Commerce of the United States of America for leave to participate in oral argument as amicus curiae, for divided argument and for additional time filed.
20	Jan 20 1987		Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
21	Jan 27 1987		Motion of Chamber of Commerce of the United States of America for leave to participate in oral argument as amicus curiae, for divided argument and for additional time DENIED.
23	Feb 2 1987		Order extending time to file brief of appellee on the merits until February 4, 1987.
24	Jan 30 1987		Brief of appellee P. Daniel Coyne, Dir., etc. filed.
25	Jan 28 1987		Brief amicus curiae of Employment Law Center and Plant Closures Project filed.
26	Feb 4 1987		Brief amicus curiae of AFL-CIO filed.

No. 86-341-ASX

Entry	Date	Note	Proceedings and Orders
27	Feb 6 1987		CIRCULATED.
28	Feb 6 1987		SET FOR ARGUMENT. Tuesday, March 24, 1987. (2nd case)
29	Mar 16 1987	X	Reply brief of appellant Ft. Halifax Packing Co., Inc. filed.
30	Mar 24 1987		ARGUED.

86-341

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.
Appellant

—v.—

MARVIN W. EWING, Director Bureau of Labor Standards, Department of Labor
Appellee

and

FORT HALIFAX PACKING COMPANY, INC.
Appellant

—v.—

RAYMOND BOURGOIN, *et al.*
Appellees

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

JURISDICTIONAL STATEMENT

JOHN C. YAVIS, JR.
(*Counsel of Record*)

THOMAS J. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone (203) 240-6000

Appellant's Attorneys

Questions Presented

1. Whether The Employee Retirement Income Security Act Of 1974, 29 U.S.C. § 1001 *Et Seq.*, Which Explicitly Supersedes "Any And All State Laws Insofar As They May . . . Relate To Any Employee Benefit Plan", Preempts A State Statute Requiring An Employer To Establish An Employee Severence Pay Plan With Benefits Either Determined By Contract Or By That Statute.

2. Whether The National Labor Relations Act, 29 U.S.C. § 141 *Et Seq.*, Preempts A State Statute That Discriminates Against Unionized Employers i) By Compelling Them To Reach An Agreement On A Mandatory Subject Of Bargaining (Severance Pay) Or Incur Specified Liability And ii) By Allowing Nonunion Employers Unilaterally To Avoid The Specified Liability.

Parties to the Proceeding

The parties to the proceeding below were as follows:

Plaintiff-Appellees:

Director of Bureau of Labor Standards (State of Maine); Raymond Bourgoin; Clarence Hachey; Reginald Pooler; Audrey Tyler; Dorothy Dyer; Debbie LaMontagne; Lawrence Belanger; Raymond Caouette; Alice Gurney; Bertha Knowles; Eugene Bourgoin

Defendant-Appellant:

Fort Halifax Packing Company[1]

Amicus Curiae:

Chamber of Commerce of the United States of America; Maine Chamber of Commerce and Industry

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[1]In accordance with Rule 28.1 of the Rules of this Court, Fort Halifax Packing Company, a Maine corporation, states that since June 24, 1986 it has been a wholly-owned subsidiary of Corbett Enterprises, Inc., a Delaware corporation with its executive offices in West Hartford, Connecticut ("Corbett Delaware"). Prior to June 24, 1986 Fort Halifax Packing Company was a wholly-owned subsidiary of Corbett Enterprises, Inc., a Missouri corporation ("Corbett Missouri"), whose executive offices were also in West Hartford, Connecticut. On June 24, 1986, in a statutory merger under the laws of Delaware and Missouri, Corbett Missouri was merged into Corbett Delaware, with the Delaware corporation as the surviving corporation. Corbett Poultry, Inc., a Delaware corporation, is also a wholly-owned subsidiary of Corbett Delaware.

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TABLE OF AUTHORITIES

U.S. Constitution and Statutes:

Other Authority:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

MARVIN W. EWING, Director Bureau of Labor Standards, Department of Labor

Appellee

and

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

RAYMOND BOURGOIN, *et al.*

Appellees

JURISDICTIONAL STATEMENT

Appellant Fort Halifax Packing Company appeals from the final judgment of the Maine Supreme Judicial Court, dated June 2, 1986, holding that 26 M.R.S.A. § 625-B is not preempted by either the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* or the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*

Opinions Below

The opinion of the Maine Supreme Judicial Court, entitled *Director of Bureau of Labor Standards, et al.* v. *Fort Halifax Packing Company*, which appears in Appendix A, is reported at 510 A.2d 1054 (Me. 1986). The opinions of the Maine

Superior Court after trial and granting partial summary judgment, appearing in Appendices B and C respectively, are not reported.

Jurisdiction

The Maine Supreme Judicial Court issued its decision on June 2, 1986. The appellant filed a Notice of Appeal with the Clerk of the Maine Supreme Judicial Court and simultaneously filed a copy with the Clerk of the Maine Superior Court, Kennebec County, on August 4, 1986 (Appendix D). This appeal is being docketed within 90 days from the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved

Article VI, United States Constitution:

. . . the laws of the United States . . . shall be the supreme law of the Land . . .

Statutes:

Section 625-B, Title 26 of the Maine Revised Statutes Annotated and relevant portions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, and of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, are reprinted in Appendix E.

Statement of the Case

From 1952 through 1981, Fort Halifax Packing Company ("Fort Halifax") and predecessor companies operated a poultry packaging and processing plant in Winslow, Maine. Corbett Enterprises, Inc., a multistate poultry producer, acquired all of the assets of Fort Halifax in 1972. Almost all of Fort Halifax's

approximately 125 employees were represented by Local 385 of the Amalgamated Meat Cutters & Butcher Workmen of North America. The union employees were covered by a series of collective bargaining agreements and, from 1972, participated in the "Corbett Enterprises, Inc. Retirement Plan For Production Employees." From 1972, administrative and clerical employees not covered by a collective bargaining agreement participated in the "Corbett Enterprises, Inc. Retirement Plan for Sales, Administrative and Clerical Employees." Both Corbett Enterprises plans uniformly covered employees in eleven states.

On May 21, 1981, because of adverse market conditions, Fort Halifax laid off most of its employees.[2] On October 30, 1981, eleven employees filed suit against Fort Halifax in Maine Superior Court seeking severance pay under 26 M.R.S.A. § 625-B (Appendix E). On November 2, 1981, the Director of the Bureau of Labor Standards of the Maine Department of Labor also commenced suit under 26 M.R.S.A. § 625-B. The latter action subsumed the individual plaintiffs' action. *See* 26 M.R.S.A. § 625-B(5).

Section 625-B requires certain employers that have shut down or relocated their operations to pay their former employees severance pay at the rate of one week's pay per year of employment unless: i) the relocation or termination resulted from natural calamity; ii) *the employee is covered by an express contract providing severance pay;* iii) the employer relocates its operations and the employee accepts employment at the relocation site; or, iv) the employee has been employed for less than three years.

Fort Halifax answered the complaints and asserted as defenses, *inter alia,* that the Maine statute was preempted by Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, and the National Labor Rela-

[2]Pursuant to the Retirement Plans employees became eligible for immediate vesting and distribution of plan assets.

tions Act ("NLRA"), 29 U.S.C. § 141 *et seq. See* Appendix F at ¶ 24, A71 and ¶ 33, A77. The Maine Superior Court rejected Fort Halifax's federal preemption defenses and entered judgment against it. (*See* Appendix C at A36, A42; Appendix B at A23, A26.)

On appeal to the Maine Supreme Judicial Court, Fort Halifax argued, *inter alia,* that the Superior Court erred in holding that Section 625-B was not preempted by ERISA and the NLRA. In an opinion issued on June 2, 1986, the Supreme Judicial Court rejected these claims.

In considering Fort Halifax's claim that ERISA preempts the Maine severance pay statute, the Supreme Judicial Court explicitly recognized that under Section 514(a) of ERISA any state law that "relates to" an employee benefit plan is preempted. *See* Appendix A at A6-A7. It also recognized that this Court has given the phrase "relate to" a "rather broad construction." *Id.* However, it held that ERISA did not preempt Section 625-B on the theory that the severance pay liability thereunder was a state-created fringe benefit. The Maine Supreme Judicial Court stated:

> In this case the severance pay liability created by Section 625-B is not a plan created by an employer or employee organization. Instead, it is a state created fringe benefit passed within the police power for the purpose of dealing with the economic dislocation that accompanies the shutdown of large establishments. Inasmuch as Section 625-B does not implicate a plan created by an employer or employee organization, it cannot be said to be preempted by ERISA.

Id. at A8.

The Supreme Judicial Court also rejected Fort Halifax's claim that Section 625-B interferes with the collective bargaining process and is preempted by the NLRA. The Court stated:

> Although Section 625-B does affect the collective bargaining relationship by encouraging employers to either agree to some form of severance pay contract or face liability under the act, it does not limit the rights of self-organization or forms of collective bargaining protected by the NLRA and is not preempted by the act.

Id. at A12.

Fort Halifax now appeals to this Court pursuant to 28 U.S.C. § 1257(2).

The Reasons For Granting Plenary Review

I. Introduction

ERISA Preemption. ERISA comprehensively regulates employee pension and welfare plans. An employee welfare plan includes

> any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment . . . or (B) any benefit described in section [302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c)].

29 U.S.C. § 1002(1). Section 302(c)(6) of the LMRA refers to "pooled vacation, holiday, *severance,* or similar benefits." Therefore, severance pay plans are employee welfare benefit plans within the definition of 29 U.S.C. § 1002(1)(B). *Holland* v. *Burlington Industries,* 772 F.2d 1140, 1144 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.,* 54 U.S.L.W. 3836 (Sup. Ct. June 23, 1986); *Gilbert* v. *Burlington Industries, Inc.,* 765 F.2d 320, 326 (2d Cir. 1985), *aff'd mem.,* 54 U.S.L.W. 3836 (Sup. Ct. June 23, 1986).

By enacting ERISA, Congress "aimed to occupy fully the field of employee benefit plans and to establish it 'as exclusively a federal concern.'" *Gilbert*, 765 F.2d at 326 (*quoting Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Congress' goal was to create uniformity in benefit laws and prevent inconsistent or conflicting state regulation of employee benefit plans. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98-99 (1983); *Holland*, 772 F.2d at 1147. To accomplish this goal Congress enacted Section 514 of ERISA, 29 U.S.C. § 1144, which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." Section 514 has been referred to as the "'most sweeping federal preemption [provision] ever enacted by Congress.'" *Holland*, 772 F.2d at 1146 (citation omitted).

NLRA Preemption. The NLRA comprehensively regulates labor relations. With regard to collective bargaining the NLRA principally is concerned with establishing an equitable process for determining terms and conditions of employment.

As restated in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S. Ct. 2380, 2392-95 (1985), this Court has developed two analytical approaches to NLRA preemption. The first, drawn from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), provides that "state regulations and causes of action are presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the [NLRA]." *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498 (1983). The second, drawn from *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), "proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes." *Belknap*, 463 U.S. at 499 (citations omitted).

State Interference. This case thus presents substantial ques-

tions concerning the authority of the states to legislate employee benefits within the comprehensive framework of federal ERISA and NLRA regulation. The Maine severance pay statute requires an employer to establish a type of employee benefit plan regulated by ERISA. If the holding of the Maine Supreme Judicial Court is affirmed, states will be free to require employers to maintain any employee benefit plan the state desires (including, for example, a pension plan) in lieu of liability established by the terms of an employee benefit statute. This result would completely undermine Congress' intent that employee benefits be exclusively a federal concern. The Maine statute also intrudes upon the collective bargaining process. If the holding in this case is affirmed, states will be free to augment a union's bargaining power on mandatory subjects of bargaining. This result would undermine Congress' intent to have the substantive terms of collective bargaining agreements result from the free play of economic forces.

II. ERISA preempts the Maine severance pay statute

Metropolitan Life Insurance Co. v. *Massachusetts*, 105 S. Ct. 2380 (1985), reaffirms the principle announced in *Shaw* and *Alessi* v. *Raybestos-Manhattan*, 451 U.S. 504 (1981), that Section 514 "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." 105 S. Ct. at 2389. Severance pay falls within ERISA's sphere. *Holland*, 772 F.2d at 1145-46; *Gilbert*, 765 F.2d at 324-26. Accordingly, ERISA preempts any state law that "relates to" a severance pay plan. Under the test set forth in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), a law "relates to" a severance pay plan "if it has a connection with or reference to such a plan." *Id.* at 97.

The Maine severance pay statute requires that an employer have a severance pay plan. The statute provides the employer with the option of i) accepting the statutory terms and conditions of that plan or ii) selecting other terms and conditions.

However, either option results in the creation of a severance pay plan.

The Maine severance pay statute itself identifies the terms and conditions of the mandated plan. The statute: i) requires severance benefits to be paid; ii) creates former employees as the class of beneficiaries; iii) identifies the employer's general assets as the source of payment; and iv) specifies a procedure for collecting those benefits. This is all that ERISA requires of an employee benefit plan. *See Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc) (a plan exists under ERISA "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits"). *Accord Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-04 (9th Cir. 1985); *Molyneux* v. *Arthur Guinness & Sons*, 616 F. Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1267 (N.D. Ala. 1983). Since the very operation of 26 M.R.S.A. § 625-B requires an employer to establish a "plan", *a fortiori*, the statute has "connection with or reference to" an employee benefit plan and is preempted by ERISA. *See Shaw*, 463 U.S. at 96-97.

The Maine Supreme Judicial Court found no ERISA preemption "[b]ecause Maine's severance pay statute is operative only when a privately created employee benefit plan covering severance pay is not in existence." *See* Appendix A at A8. This conclusion presumes that there is no ERISA "plan" where employee benefits are mandated by state law. However, in *Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), this Court affirmed the Ninth Circuit's rejection of the same reasoning. There, plaintiff challenged a state law requiring employers to provide a comprehensive prepaid health care plan to their employees. The State of Hawaii argued that federal preemption did not apply because the term "employee benefit plan" in Section 3 of ERISA, 29 U.S.C. § 1002, did not encompass plans mandated by state law. The Ninth Circuit rejected this argument, stating:

> We cannot agree . . . with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. . . . There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees. . . . The plans envisioned under the Hawaii statute are therefore not rendered outside the definition of employee welfare benefit plans *simply because Hawaii has attempted to make them mandatory.*

633 F.2d at 764 (citations omitted) (emphasis supplied). Since the benefit package required by the Hawaii statute constituted a "plan" under ERISA, the Ninth Circuit held that the law "related to" an employee benefit plan and therefore was preempted.

Agsalud cannot be reconciled with the Maine Supreme Judicial Court's analysis, and it is *Agsalud* that finds support in the plain language of ERISA. Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), exempts from ERISA's coverage a "plan . . . maintained solely for the purpose of complying with [i] applicable workmen's compensation laws or [ii] unemployment compensation [laws] or [iii] disability insurance laws." These are the only exemptions for state-mandated employee benefits. In an attempt to salvage the Maine statute, the Maine court posited a general exemption for all employee benefits distributed in accordance with a statutory formula rather than pursuant to a private contract. This construction is at odds with the broad definition of the term "plan". *See, e.g., Donovan, supra.* Moreover, if Congress had intended such a sweeping exemption, Section 4(b)(3)'s specific exemption for the three listed employee benefits would be superfluous. As it did in *Metropolitan*, this Court should reject a construction that would render ERISA

provisions "unnecessary" or "redundant". 105 S. Ct. at 2390. Instead, the Court may give effect to Section 4(b)(3) by holding, as in *Agsalud*, that the "plans envisioned under the [Maine] statute" are ERSIA employee benefit plans. 633 F.2d at 764.

III. The NLRA preempts the Maine severance pay statute

Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); C. Morris, The Developing Labor Law 773-74 (2d ed. 1983). Accordingly, labor and management are bound to negotiate in good faith concerning severance pay issues. However, the NLRA provides that the bargaining "obligation does not compel either party to agree to a proposal." *See* Section 8(d), 29 U.S.C. § 158(d). In construing Section 8(d), this Court has stated time and again over several decades that Congress intended employers and unions to negotiate in a generally unregulated atmosphere. *See, e.g., Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *Local 24 of the International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959). The Court has elaborated:

> [T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Porter, 397 U.S. at 108. *See Teamsters*, 358 U.S. at 296 (states may not limit "the solutions that the parties' agreement can provide to the problems of wages and working conditions"). *Accord Machinists*, 427 U.S. at 140, 148-51 (the parties' agreement should be controlled only by the "free play of economic forces").

Recently, this Court restated the NLRA limitation upon the States:

> "The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.'"

Metropolitan, 105 S. Ct. at 2395 (citations omitted). *Metropolitan* involved a Massachusetts statute requiring *insurers* (not employers) to provide minimum mental health care benefits in general insurance policies. As noted by this Court, the *Metropolitan* appellants did not even suggest that the statute operated to alter "the balance of power between the parties to the labor contract." 105 S. Ct. at 2395. Rather, the appellants attempted to expand NLRA preemption principles by arguing that Congress

> intended to prevent the States from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law.

Id. This Court disagreed, stating that the NLRA is concerned with the "equitable process for determining terms and conditions of employment." *Id.* at 2396. The substantive terms themselves do not implicate NLRA preemption "when the parties are negotiating from relatively equal positions." *Id.*

Stressing the lack of incompatibility between federal labor policy aimed at maintaining "the equality of bargaining power" and a state statute imposing "minimal substantive requirements,"

this Court upheld the Massachusetts statute. *Id.* at 2397. In doing so, the Court made clear that its holding rested upon two critical criteria:

> 1. That the "minimum standards" neither encouraged nor discouraged the collective bargaining process; and,
>
> 2. That the "minimum standards" affected union and nonunion employees equally.

The Maine severance pay statute does not meet either of these criteria.

The Maine statute intrudes upon the bargaining *process*. Unlike *Metropolitan,* here the statute provides the union with a bargaining chip because there is no minimum standard. Thus, the union can effectively leverage the employer by withholding agreement on a contractual severance pay provision unless the employer i) contracts for *more* than the statutory severance pay or ii) *concedes* some other negotiable benefit in return for a contract providing *less* than the statutory benefit. Moreover, in *Metropolitan,* this Court emphasized that employers could avoid the statutory liability altogether either by self-insuring or by not agreeing to provide insurance coverage. 105 S. Ct. at 2394. Here, employers do not have similar options. Consequently, the operation of the statute upsets the natural course of the collective bargaining process by augmenting the union's bargaining power.

The Maine statute also fails the second *Metropolitan* criterion by not "affect[ing] union and nonunion employees equally." Because it does not establish a minimum benefit standard, the statute promotes inequality. The statutory severance benefit of one week's pay per year of service does not apply if there is an express contract providing severance pay at any level. Thus, an employer not subject to collective bargaining may unilaterally institute a severance pay plan with whatever benefit level it wishes to provide (for example, one dollar for each year of

employment) and thereby avoid the statutory liability. Employers subject to collective bargaining, on the other hand, cannot similarly avoid the reach of the statute. In *Metropolitan,* this Court stated:

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Allis-Chalmers Corp.* v. *Lueck,* — US, at —, 85 L Ed 2d 206, 105 S Ct 1904 (slip op 9-10). It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who had chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Id. at 2398. Conversely, it does not further any purpose of the NLRA to require unionized employers to provide terms of employment that other employers may substantially avoid unilaterally. This penalizes workers who freely exercise their NLRA § 7 right not to join a union. 29 U.S.C. § 157 (employees "have the right to *refrain* from [union] activities") (emphasis supplied).

The Maine Supreme Judicial Court also incorrectly characterized the Maine statute as a valid exercise of the state police power. The statute is inconsistent with the purposes of the NLRA and does not provide economic protection to all citizens. *Cf. Metropolitan,* 105 S. Ct. at 2398-99 (a valid exercise of the police power found where the statute established generally-applicable minimum employment standards not inconsistent with the purposes of the NLRA).

There is an additional important distinction between *Metropolitan* and this case: *Metropolitan* involved insurance. By virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and Section 514(b)(2) of ERISA, 29 U.S.C. § 1144(b)(2), insurance is an area of employee benefits over which the states

have continued regulatory authority. There is no similar Congressional intent that states retain authority to regulate severance pay. To the contrary, severance pay is a matter of exclusive federal regulation. *Holland* v. *Burlington Industries* and *Gilbert* v. *Burlington Industries, supra.*

In sum, the Maine statute i) sets up a standard that non-union employers can avoid easily and that unions can bargain away if they extract a satisfactory *quid pro quo,* and ii) interferes in an area in which the states retain little, if any, regulatory authority. Therefore, the Maine court's reliance on *Metropolitan* here was erroneous. Rather, this Court's decisions in *Alessi, Machinists, Porter* and *Teamsters* dictate the conclusion that the NLRA preempts the Maine severance pay statute.

CONCLUSION

The Maine Supreme Judicial Court's decision that state-mandated employee benefits are not preempted by ERISA is in direct conflict with *Metropolitan, Agsalud* and the *Burlington* cases, which confirm that ERISA Section 514 displaces all state laws relating to employee benefit plans. If upheld, the Maine rationale would be authority for the States to circumvent ERISA not only with respect to severance pay but for all types of employee benefits. Further, the Maine severance pay statute intrudes upon the federally-protected collective bargaining process. The questions presented merit plenary consideration. Accordingly, we request that the Court note probable jurisdiction of this appeal.

John C. Yavis, Jr.
Thomas M. Cloherty
Barry J. Waters
Thomas J. Joyce

All of:
Murtha, Cullina, Richter and Pinney
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone: (203) 240-6000
Attorneys for Appellant

86-341

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JOHN C. YAVIS, JR.
(*Counsel of Record*)

THOMAS J. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone (203) 240-6000

Appellant's Attorneys

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APPENDIX TO JURISDICTIONAL STATEMENT

APPENDIX A

June 2, 1986—Opinion of the Maine Supreme Judicial Court

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 4142
Law Docket No. Ken-85-216

DIRECTOR OF BUREAU OF LABOR STANDARDS, *et al.*

—v.—

FORT HALIFAX PACKING COMPANY

Argued November 15, 1985
Decided June 2, 1986

Before MCKUSICK, C.J., NICHOLS, ROBERTS, GLASSMAN, and SCOLNIK, JJ.

ROBERTS, J.

Fort Halifax Packing Company (hereafter Halifax) appeals from a judgment rendered in the Superior Court, Kennebec County, granting severance pay in varying amounts to over 80 of its employees pursuant to 26 M.R.S.A. § 625-B (Pamph. 1985).[1]

---

[1]26 M.R.S.A. § 625-B (Pamph. 1985) provides in part:

> 2. Severance pay. Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. The severance pay

(Footnote continued on following page)

On appeal Halifax claims that the Maine severance pay statute is preempted by both the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1985) (hereafter ERISA) and the National Labor Relations Act, 29 U.S.C. §§ 157 and 158 (1985) (hereafter NLRA). Halifax also raises issues concerning the constitutionality of the severance pay statute, the propriety of the trial justice's denial of a jury trial, the appropriateness of several findings of fact and the necessity of arbitration. Although we modify the trial justice's calculation of severance pay owing to ten employees, we affirm the judgment of the Superior Court in all other respects.

I. *Facts & Procedural Background*

Halifax began packaging and processing poultry in Winslow in 1972 when it purchased the assets of Ralston Purina, a corporation that had conducted similar operations on the site since 1961. On May 23, 1981 Halifax ceased processing operations at the Winslow plant and laid off all of its workforce except several maintenance men and clerical employees.

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to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law.

3. Mitigation of severance pay liability. There shall be no liability for severance pay to an eligible employee if:

A. Relocation or termination of a covered establishment is necessitated by a physical calamity;

B. The employee is covered by an express contract providing for severance pay;

C. That employee accepts employment at the new location; or

D. That employee has been employed by the employer for less than 3 years.

At the time of the closing, Halifax had over 100 individuals on the payroll. These employees worked (1) directly in the processing plant, (2) on "live-haul" duty,[2] (3) as supervisory or administrative employees, or (4) in one of the Corbett Brothers feed mills.[3] Many of the employees who worked directly in the plant were represented by Local 385 of the Amalgamated Meat Cutters & Butcher Workmen of North America (hereafter Local 385) and had a contract with Fort Halifax. This contract had effective dates from June 2, 1979 to June 2, 1982 and contained no provision for severance pay. In fact, at the time of the closing Halifax had no contract or agreement regarding severance pay that governed any of the employees delineated above.

Following the closing, Halifax met with officials of the State of Maine and union representatives to discuss the possibility of reopening the plant. Specifically in the fall of 1981 Halifax suggested that reopening was possible and sought concessions from Local 385 in the form of amendments to the union contract. The amendments, *inter alia,* sought to add a severance pay provision to the contract that would shield Halifax from severance pay liability for union members under 26 M.R.S.A. § 625-B in the event that the plant reopened. Although Local 385 signed the agreement on November 1, 1981, Halifax never resumed operations before the expiration date of the proposed amendments, June 2, 1984.

Prior to the signing of the amendments, on October 30, 1981

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[2]"Live-haul" duty employees were used by Halifax to travel to various farms to catch, crate and transport poultry grown by independent farmers for sale to Halifax.

[3]Corbett Brothers is a subsidiary of Halifax that produced table and hatching eggs as well as broilers. Halifax used this subsidiary, *inter alia,* to raise the poultry necessary for processing.

eleven employees of the plant filed suit against Halifax in Superior Court seeking severance pay pursuant to 26 M.R.S.A. § 625-B. A few days later the Director of the Bureau of Labor Standards also commenced an action to enforce the provisions of Maine's severance pay law as to all Halifax employees pursuant to 26 M.R.S.A. § 625-B(5).[4] At a trial held in the Superior Court without a jury, the trial justice found that Halifax was liable for severance pay and provided a precise computation of the amounts owing to eligible individuals.

II. *ERISA Preemption*

As its first contention on appeal, Halifax in conjunction with amici,[5] argues that it is not liable for severance pay under 26 M.R.S.A. § 625-B because that statute is preempted by ERISA. For the reasons set forth below, we disagree. It is through operation of the supremacy clause of the United States Constitution that federal law preempts conflicting state law. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 210-211 (1824). A conflict warranting preemption may be direct in that the state regulation obviously contradicts federal regulations, or it

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[4]26 M.R.S.A. § 625-B(5) provides in part:

> 5. Suits by the director. The director is authorized to supervise the payment of the unpaid severance pay owing to any employee under this section. The director may bring an action in any court of competent jurisdiction to recover the amount of any unpaid severance pay. The right provided by subsection 4 to bring an action by or on behalf of any employee, and of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the director in an action under this subsection, unless the action is dismissed without prejudice by the director. . . .

[5]The Chamber of Commerce of the United States and the Maine Chamber of Commerce and Industry filed an amicus brief pursuant to M.R. Civ. P. 75A(f)(1) in support of Halifax's preemption arguments.

may arise from congressional intent, either express or implied, to occupy a particular area. *McDermott* v. *State of Wisconsin,* 228 U.S. 115, 132-134 (1913); *Metropolitan Life Ins. Co.* v. *Massachusetts,* 105 S.Ct. 2380, 2393 (1985) (citing *Malone* v. *White Motor Corp.,* 435 U.S. 497, 504 (1978)). Preemption, however, is not a favored concept, and federal regulation will be deemed to be preemptive of state regulatory powers only if grounded in "persuasive reasons—either the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably 'so ordained.'" *Alessi* v. *Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522 (1981) (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963)).

As the preamble to the Act indicates, ERISA was enacted in 1974 for the purpose of regulating private employee benefit plans established and maintained by employers and employee organizations. 29 U.S.C. § 1001(a) (1985). *See also* Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974,* 46 U. Chi. L. Rev. 23 (1978). Prior to ERISA's passage regulation of privately created employee benefit plans was generally confined to state laws that were not uniquely adapted to protect the participants of such plans. Hutchinson, 46 U. Chi. L. Rev. at 25. Growth in size of employee benefit plans and a concomitant increase in loss of benefits by employees compelled Congress to establish uniform disclosure, reporting, vesting and funding standards meant to ensure that employees would not lose benefits in plans created by employers or employee organizations. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess. (1973). Essentially, ERISA is concerned with regulating two types of privately created employee benefit plans—pension plans that provide for retirement or deferred income (29 U.S.C. § 1002(2)) and welfare benefit plans that provide for medical, sickness, accident and other non-pension fringe

benefits (29 U.S.C. § 1002(1)).[6] The Act specifically states that its requirements are meant to cover those plans created by employers and employee organizations. 29 U.S.C. § 1003(a).[7]

With an eye towards making regulations of private employee benefit plans exclusively a federal concern, ERISA also contains an express preemption provision which provides:

> Except as provided in subsection (6) of this section, the provisions of this title and title IV shall supersede any

[6]Part one of ERISA covers the reporting and disclosure requirements for both types of plans. The basic purpose of these requirements is to keep employees informed of their rights and to enable the Secretary of Labor to assess the financial soundness of plans. Consequently, under Part one fund administrators must furnish plan participants with a description of the plan and provide a copy of the annual report. Such information must also be supplied to the Secretary of Labor.

Parts two and three of ERISA address pension benefit plans only. These sections establish minimum vesting, participation and funding requirements.

Part four applies to both types of plans and sets the fiduciary standards for plan management. A "prudent man" standard is established for fund administrators and a list of prohibited financial transactions is given.

Part five of ERISA contains the enforcement provisions of the Act. It creates broad criminal and civil penalties and gives the Secretary of Labor investigative powers and authority to promulgate regulations.

[7]Title 29 U.S.C. ¶ 1003(a) provides in part:

> (a) . . . [T]his subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

> and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. . . .

29 U.S.C. § 1144. Thus, in this case we must address the question of whether in light of the ERISA's purposes and the existence of an express preemption provision Congress has "unmistakably . . . ordained" preemption of Maine's severance pay law.

In *Shaw* v. *Delta Airlines*, 463 U.S. 85 (1983), the Supreme Court gave a rather broad construction to the "relate to" language in ERISA's preemption provision. In *Shaw* the Court held that the Section 1144 not only preempts state laws dealing with the subject matters covered by ERISA, e.g. reporting, disclosure, and fiduciary responsibility, but also those state laws that have "a connection with or reference to" employee benefits plans covered by the statute. *Id.* at 97, 98. Inasmuch as Maine's severance pay law does not attempt to regulate the reporting, disclosure, and fiduciary subjects covered by ERISA, our statute will be preempted only if it can be said to have "a connection with or reference to" employee benefit plans that are within ERISA's coverage.

Our inquiry in this regard is made simple by the fact that the Maine severance pay statute does not affect employee benefit plans that are within ERISA's regulatory reach. Title 29 U.S.C. §§ 1003(a) and 1002(1) make it clear that the employee benefit plans intended for coverage under ERISA are those created by employers or employee organizations. Thus, the preemptive effect of section 1144 is on those State laws that affect plans created by either of these private parties.[8]

[8]Consequently, those state laws that have been held by the Supreme Court to be preempted implicate plans that have been created by em-

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In this case the severance pay liability created by Section 625-B is not a plan created by an employer or employee organization. Instead, it is a state created fringe benefit passed within the police power for the purpose of dealing with the economic dislocation that accompanies the shut-down of large establishments. Inasmuch as Section 625-B does not implicate a plan created by an employer or employee organization, it cannot be said to be preempted by ERISA.

Moreover, Section 625-B contains an explicit provision that totally eliminates state regulation if a plan covering severance pay *is created* by an employer or employee organization. Specifically, Section 625-B(3)(B) provides: "There shall be no liability for severance pay to an eligible employee if: . . . [t]he employee is covered by an express contract providing for severance pay, ..." Such a contractual arrangement presumably would constitute a plan created by an employer or employee organization for purposes of ERISA. It would be subject to the full panoply of requirements created in that statute and would then be immune from state regulation. Because Maine's severance pay statute is operative only when a privately created employee benefit plan covering severance pay is not in exist-

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ployer or employee organizations. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) a New Jersey State law was held to be preempted because it eliminated a method for calculating pension benefits in a privately created plan that was permitted by ERISA. The statute implicated in *Alessi* was the New Jersey Workers' Compensation Act, which prohibited employers from reducing a retiree's pension benefits by an amount equal to the workers' compensation award for which the retiree was eligible. The Supreme Court held that ERISA leaves to the private parties who create the pension plan the determination of the amount of benefits that, once vested, cannot be forfeited. Since the parties in *Alessi* agreed on the offset, the Court held that the New Jersey law was preempted insofar as it eliminated this method of calculating pension benefits.

ence, it does not have a "connection with or reference to" an employee benefit plan covered by ERISA and is thus not preempted by Section 1144.[9]

III. *NLRA Preemption*

Unlike ERISA, the NLRA does not contain an explicit preemption provision. As a result, the NLRA's preemptive effect must be discerned by implication from the policies of the act. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Halifax and amici argue that because the Maine severance pay statute mandates the substantive terms of its collective bargaining agreement, this state statute is preempted by the NLRA.

The NLRA was enacted in 1935 for the purpose of addressing industrial strife by encouraging collective bargaining. 29 U.S.C. § 151. Aimed at redressing "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate association," the NLRA's goal was to restore equality of bargaining power in the hope that depressed wage rates would thereby be resolved. 29 U.S.C. § 151. The act protects employees' rights to organize and to engage in concerted action in Section 7 and defines unfair labor practices by employers and labor organization in Section 8. 29 U.S.C. §§ 157, 159. As the Supreme Court noted in *Metropolitan Life Insurance Co.* v. *Massachusetts,* 105 S.Ct. 2380, 2396 (1985), "The NLRA is concerned primarily with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive

[9]We need not decide whether the "express contract" exclusion of section 625-B(3) (B) must necessarily reach every informal plan meeting the ERISA definition. *See Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985).

terms of the bargain that is struck when the parties are negotiating from relatively equal positions." (Emphasis added.)

Grounding its decisions in the policies of the NLRA, the Supreme Court has discerned two different principles of preemption that flow from the act. The first is based on implied congressional intent to leave certain conduct that is neither protected nor prohibited by either Section 7 or 8 of the act unrestricted from most forms of regulation by either the NLRB or the states. *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). Cases dealing with this type of preemption . . . "rely on the understanding that in providing in the NLRA a framework for self-organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated and how much should be left . . ." to the free play of economic forces. *Metropolitan Life*, 105 S.Ct. at 2395.

Despite the seeming broad range of this branch of NLRA preemption, state laws of general application that impose minimal substantive requirements on contract terms are not preempted.[10] As the Supreme Court noted in *Metropolitan Life*:

[10]Those state laws that have been held by the Supreme Court to be preempted invariably involve attempts by the state to regulate employer or employee conduct and control the collective bargaining process. Thus, in *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964), the Court struck down an Ohio law that prohibited a type of secondary boycott and ruled that if the state law were allowed to deprive the union of this self-help weapon "the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available and to upset the balance of power between labor and management expressed in our national labor policy." *Id.* at 260. Similarly, in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court overruled a state law that penalized a concerted refusal to work overtime and held that this conduct by organized employees was intended to be unregulated as a self-help mechanism.

> Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad of state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. The states traditionally have had great latitude under their police powers to legislate as "'to the protection of lives, limbs, health, comfort and quiet of all persons.'" *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) quoting *Thorpe* v. *Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1855). "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). State laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays and those dictating payment to employees for time spent at the polls or on jury duty all have withstood scrutiny. *See e.g., Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952).

Id. at 2398.

Maine's severance pay law is a statute of general application that affects union and nonunion employees equally. Designed to protect Maine citizens from the economic dislocation that accompanies closing of large establishments, the severance pay statute is a legitimate exercise of the state's police power. *Shapiro Bros. Shoe Co., Inc.* v. *Lewiston Auburn S.P.A.*, 320 A.2d 247, 254 (Me. 1974); *State* v. *Union Oil Co. of Maine*, 151 Me. 438, 120 A.2d 708 (1956). The statute, in fact, has

a very limited impact on the collective bargaining process inasmuch as it does not ever apply when the parties have reached an agreement on the subject of severance pay via an express contract. Although Section 625-B does affect the collective bargaining relationship by encouraging employers to either agree to some form of severance pay contract or face liability under the act, it does not limit the rights of self-organization or forms of collective bargaining protected by the NLRA and is not preempted by the act.

The second line of preemption that can be discerned from Supreme Court cases interpreting the NLRA protects the primary jurisdiction of the NLRB to determine what kind of conduct is either prohibited or protected by the NLRA and was most thoroughly explored in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). Under the *Garmon* rule, preemption of a state law must occur:

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, ...

Id. at 244. *Garmon* preemption accomplishes Congress's purpose of creating an administrative agency in charge of creating detailed rules to implement the act, rather than having the act enforced and interpreted by the state or federal courts.

As a result, state statutes that have been held to be preempted under *Garmon* involve state action that attempts to directly regulate conduct protected under Section 7 or prohibited under Section 8. Thus, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971) the Supreme Court held that a state court did not have jurisdiction of a claim filed against a union

by an employee who was fired for failure to pay union dues because the union's conduct was covered by either Section 7 or 8 thus subject to the jurisdiction of the NLRA.

Conversely, other Supreme Court cases denying preemption often recognize the importance of the state interest involved and uphold the state activity. In *Farmer* v. *United Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977), the Court held that the NLRA did not preempt the state tort action for intentional infliction of emotional distress arising in connection with a claim of employment discrimination by the union because the state had a substantial interest in protecting its citizens from the outrageous conduct alleged.

Halifax and amici contend that the Maine severance pay law regulates conduct protected by the NLRB by (1) imposing a different resolution to a bargaining impasse than is required by Section 8(d)[11] and (2) interfering with the employer's right under section 7 to implement its last best offer unilaterally. Despite Halifax's attempt to characterize the severance pay statute as interfering with these employer rights and thus with the jurisdiction of the NLRB, its arguments on this score simply amount to a restatement of the position that Maine may not

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[11]Section 8(d) provides in part:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal *or require the making of a concession*. . . .

(Emphasis added.)

employ its police power to enact a law of general application that has an effect on the collective bargaining process. As such, Halifax's contentions do not even implicate *Garmon*-type preemption. Moreover, even if we were to decide that Section 625-B does interfere with the jurisdiction of the NLRB, the statute would be saved from preemption under the reasoning of *Farmer* set out above because it reflects the state's substantial interest in protecting Maine citizens from the economic dislocation that accompanies large-scale plant closings.

IV. *Constitutional Challenge*

Halifax also contends that the application of section 625-B in these circumstances will result in an unconstitutional impairment of contractual obligations and the imposition of liability without due process. Halifax apparently considers that the impact of the statute will impair the agreement between Halifax and its predecessor as well as the agreement between Halifax and its employees. First, Halifax has not identified any obligation between itself and its predecessor that will be impaired by the statute's operation. Second, the collective bargaining agreement governing Halifax's employees was executed in 1979, almost four years after the effective date of the statute. We have previously observed that "the law in effect at the time of the execution of a contract becomes part of that contract." *Portland Savings Bank* v. *Landry*, 372 A.2d 573, 575 (Me. 1977).

Halifax relies principally upon the decision of the Supreme Court in *Allied Structural Steel* v. *Spannaus*, 438 U.S. 234 (1978). Halifax asserts that the facts in *Allied Structural Steel* were remarkably similar to the facts in the case at bar. That assertion overlooks the fact that the Minnesota statute struck down in *Allied Structural Steel* was applied to a preexisting contract and may even have been aimed at a particular employer. *See Energy Reserves Group* v. *Kansas Power and Light*

Co., 459 U.S. 400, 412 n.13 (1983). A careful reading of *Allied Structural Steel* reveals the significance of the temporal application of the Minnesota statute. The Court stated that a basic term of the contract was substantially modified retroactively and described the effect as a severe disruption of contractual obligations. *Allied Structural Steel*, 438 U.S. at 246, 47. Halifax, on the other hand, entered into its 1979 labor agreement with the severance pay statute already on the books. Thus, Halifax fails to get across the threshold inquiry of whether the state law has operated to impair substantially a contractual relationship. *Energy Reserves*, 459 U.S. at 411.

Finally, Halifax claims that the inclusion of pre-1975 periods of employment in the computation of severance pay constitutes an unconstitutional retroactive application of section 625-B. The Supreme Court has stated that a "statute is not retroactive merely because it draws upon antecedent facts for its operation." *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 571 (1934). The operative events in the application of the severance pay statute are the relocation or termination of a covered establishment rather than the previous periods of employment. *Cf. Adams* v. *Buffalo Forge Co.*, 443 A.2d 932, 941-42 (Me. 1982) (application of strict liability statute to products sold prior to the effective date of the act). The severance pay statute does not violate due process even though the legislation imposes liability based in part on past acts. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

V. *Denial of Jury Trial*

Halifax also argues that it was improperly denied a jury trial by the Superior Court. Article I, Section 20 of the Maine Constitution provides in part:

> In all civil suits, and in all controversies concerning property, the parties shall have a right to trial by jury, except

> in cases where it has heretofore been otherwise practiced. . . .

In *State* v. *Anton*, 463 A.2d 703, 708 (Me. 1983), we held that this provision of the Maine Constitution preserves the right to a jury trial in civil actions *where that right existed when the Maine Constitution was adopted*. Specifically, in *Anton* the Court noted:

> When a new type of statutory action is created, the existence of a constitutional right to jury trial under article I, section 20 depends on the nature of the action. (Citation omitted.) If it is a kind that was heard and determined by a common law court with a right to jury trial prior to adoption of the Maine Constitution, then article I, section 20 guarantees that right today.

Id. at 709.

Thus, Article I, Section 20 does not apply to suits in equity or to civil proceedings not tried by jury in the common law courts. *Id.* at 708. Although Halifax attempts to characterize the present action as an "employment contract dispute," it is, instead, an action to recover serverance pay under 26 M.R.S.A. § 625-B. Inasmuch as Maine's severance pay statute creates a new cause of action unknown to the common law, no right to a jury trial existed for proceedings of this nature at the time the Maine Constitution was adopted. As a result, the trial justice correctly denied Halifax's request for a trial by jury.

VI. *Findings of Fact*

Although Halifax questions several factual findings made by the Superior Court, we determine that the court committed clear error only in its calculation of severance pay for 10 of the employees held to be eligible under Section 625-B. Halifax

contends that one month's severance pay was already disbursed to these 10 individuals and that this payment should have been subtracted from the final figure calculated by the Superior Court. We agree.

Pursuant to a March 28, 1985 Superior Court order, the parties to this action submitted a list of all Halifax employees and provided information regarding disputed severance pay. As part of complying with this order Halifax and the State agreed as follows:

> The parties agree that vacation pay (column VII of Attachment A) and severance pay (column VIII) must be subtracted from gross pay before obtaining the correct weekly average wage which is set forth in column XI.

The list submitted discloses that column VIII contains a severance pay figure for 10 individuals. By agreeing that this figure termed "severance pay" should be subtracted from the "gross pay" column before average weekly wage is determined, the State, in effect, has admitted that these 10 employees were already paid one week's severance pay by Halifax. As a result, the Superior Court's calculation of severance pay for these 10 employees must be altered by subtracting the amount listed in column VIII from the gross severance pay due these employees.

VI. *"Live-Haul" Employees*

Halifax also challenges the Superior Court's legal conclusion that the "live-haul" employees were employed by a "covered establishment" for the purpose of Section 625-B. It is Halifax's contention that the "covered establishment" phrase applies only to those who work physically within a plant. As a result, Halifax seeks to have this Court reverse the trial justice with respect to his award of severance pay to "live-haul" employees.

As was discussed above, Section 625-B requires that employers who terminate a "covered establishment" pay severance benefits to their employees. The term "covered establishment" moreover, is defined by the Act as "any industrial or commercial facility or part thereof which employs or has employed at any time in the preceding 12-month period 100 or more persons." 26 M.R.S.A. § 625-B(1)(A).

The Halifax packaging and processing plant in Winslow fits squarely within the definition of "covered establishment" delineated above. The "live-haul" employees, moreover, were employed by this facility. Although most of their activity occurred outside the physical space of the plant, the following facts support the trial justice's ultimate conclusion that they were employees of a "covered establishment" for purposes of the Act: (1) the men were paid by Halifax, (2) their jobs were essential to Halifax's poultry processing operations, (3) "live-haulers" reported to the plant and were supervised by Halifax foremen, (4) these employees were rendered unemployed by the closing. As a result, the Superior Court's award of severance pay to the "live-haul" employees must be sustained.

VII. *Necessity of Arbitration*

As its final issue on appeal, the employer argues that questions concerning liability for severance pay should have been first submitted to arbitration in light of the mandatory arbitration provision in the collective bargaining agreement with Local 385. We disagree.

Article IV, Section 5 of the collective bargaining agreement in existence between Halifax and Local 385 does provide for arbitration when "grievances arise concerning the interpretation or application of the terms" of the contract. However, the claim for severance pay that is the subject of this suit does not

arise out of the contract. In the first place, the State is the central party bringing this action under Section 625-B for all Halifax employees, union and non-union alike. Second, the contract in existence between Halifax and Local 385 at the time of the closing did not address severance pay. Consequently, resort directly to the courts by the Director of the Bureau of Labor Standards was appropriate.

The entry is:

> Judgment modified in accordance with the opinion herein to subtract severance pay already paid, and as so modified, affirmed.

All concurring.

Attorneys for Plaintiffs:

James E. Tierney, Esq.
Attorney General
William H. Laubenstein, III, Esq.
Thomas D. Warren, Esq. (orally)
Assistant Attorneys General
State House Station #6
Augusta, Maine 04333
(for Director of Bureau of
Labor Standards)

Martha E. Geores, Esq.
277 Lisbon Street
Lewiston, Maine 04240
(for Raymond Bourgoin)

Attorneys for Defendants:

CURTIS THAXTER LIPEZ STEVENS BRODER & MICOLEAU
Sidney St. F. Thaxter, II, Esq. (orally)
One Canal Plaza
Portland, Maine 04112
(for Fort Halifax Packing)

PERKINS, THOMPSON, HINCKLEY & KEDDY
Linda D. McGill, Esq.
Richard G. Moon, Esq.
John H. Rich, III, Esq.
One Canal Plaza
P. O. Box 426
Portland, Maine 04112
(for *Amici Curiae,* Chamber of Commerce of the U.S. of America and Maine Chamber of Commerce and Industry)

NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

APPENDIX B

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

STATE OF MAINE

SUPERIOR COURT

KENNEBEC, SS.

Civil Action,
Docket No. CV-81-516/515

MARVIN W. EWING, Director of the Bureau of Labor Standards, Maine Department of Labor

—v.—

FORT HALIFAX PACKING COMPANY, INC.

and

RAYMOND BOURGOIN, *et al.*

—v.—

FORT HALIFAX PACKING COMPANY, INC.

ORDER

The trial of these consolidated cases was held on April 1, 1985 before the Court sitting without a jury. At issue is whether defendant Fort Halifax Packing Company, Inc. ("Fort Halifax") owes severance pay to former employees, pursuant to 26 M.R.S.A. § 625-B (Supp. 1984-1985). Defendant contends: 1) that section 625-B is not applicable on the facts of this case, and 2) that if section 625-B is applicable, defendant has met its obligations under the statute. After reviewing the evidence and arguments presented by the parties, the Court concludes

that section 625-B is applicable to defendant and that defendant has not fully met its obligations under the statute.

Fort Halifax is a Maine corporation with its principal place of business in Winslow. Fort Halifax is a wholly owned subsidiary of Corbett Enterprises, a Missouri corporation. In turn, Fort Halifax wholly owns Corbett Brothers, a Maine corporation. Fort Halifax's operations began in 1972 when it acquired the assets of the Ralston Purina Company located in Winslow, chiefly a broiler processing and packaging plant. Fort Halifax operated the Winslow poultry plant until May 23, 1981 when it laid off nearly all its employees.

Section 625-B(2) provides:

> Severance pay. Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. The severance pay to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law.

As used in section 625-B, a "covered establishment" means a facility "which employs or has employed at any time in the preceding 12-month period 100 or more persons." *See* 26 M.R.S.A. § 625-B(1)(A). Fort Halifax qualifies as a "covered establishment." Under section 625-B(3), there is no liability for severance pay if:

> A. Relocation or termination of a covered establishment is necessitated by a physical calamity;

> B. The employee is covered by an express contract providing for severance pay;
>
> C. That employee accepts employment at the new location; or
>
> D. That employee has been employed by the employer for less than 3 years.

Separate actions were brought by a small number of former employees and by the Director of the Bureau of Labor Standards (the "Director") to enforce the severance pay statute. In an opinion and order deciding cross motions for summary judgment in the case brought by the Director, *Ewing* v. *Fort Halifax Packing Company, Inc.*, CV81-516, this Court upheld the validity of section 625-B(2) against defendant's charges of preemption and unconstitutionality. Specifically, defendant argued that the Federal Employment Retirement Income Security Act ("ERISA), 29 U.S.C. § 1007, *et seq*, preempted Maine's severance pay statute. Defendant also argued that the Maine statute and its application was a violation of due process and equal protection, an improper exercise of the police power, and an impairment of contract. In a separate motion, defendant moved for summary judgment on a number of grounds, among them, that the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 141, *et seq*, preempts Maine's severance pay statute. The presiding Justice denied that motion without opinion.

Now that the cases have been consolidated, defendant renews its argument that section 625-B is unconstitutional and is preempted by ERISA and the NLRA. Even if the law of the case doctrine did not stand as an obstacle to reopening these issues in the present case, this Court is unpersuaded by defendant's arguments on unconstitutionality and preemption.

Turning to the central controversy, this Court must determine who among Fort Halifax's former employees is entitled to severance pay and the amount thereof. On the assumption that section 625-B(2) is enforceable, the non-administrative employees who worked exclusively at the plant are clearly entitled to severance pay under the statute. The sole question in regard to them is the amount of severance pay to which they are entitled.

The employees in dispute can be divided into four categories: 1) Corbett Farms employees, 2) feed mill employees, 3) "live haul" employees, and 4) administrative employees. Four Fort Halifax employees, Carl Fenwick, Betty Partridge, Robert Grenier, and Raymond Daigle, went to work for Corbett Farms, Inc. ("Corbett Farms"). At the time of their transfer, Corbett Farms was owned by Charles J. Auger who had been the president of Fort Halifax until the Winslow plant ceased operation. The four employees were transferred, with their consent, directly to Corbett Farms without any loss of pay or vacation benefits. Under these circumstances, the Court is compelled to conclude that the four Corbett Farms employees suffered no severance and are not entitled to severance pay.

The second category is composed of a unique class of one—Robert Grenier. Mr. Grenier worked at a feed mill owned by Corbett Brothers, some distance from the Fort Halifax plant. Mr. Grenier's supervisor was not an employee of Fort Halifax. Mr. Grenier, however, was on the Fort Halifax payroll, and he collected his wages at the Winslow complex. Mr. Grenier lost his job at the feed mill when the Fort Halifax plant was closed. Although Mr. Grenier received his paycheck from Fort Halifax, he was not employed at a "covered establishment" within the meaning of section 625-B(1)(A). Therefore, he is not entitled to severance pay from Fort Halifax.

The "live haul" employees in dispute are Robert Cummings, Harold Hubbard, Larry Hubbard, Wilfred Morey, Edgar Pooler, Robert Richardson, Winslow Tobey, Lawrence Roy, William Bird, Durwood Dow, and Edison Hubbard. These men were employed and paid by Fort Halifax. They reported to the Fort Halifax plant and were supervised by a Fort Halifax foreman in their job of gathering chickens from outlying farms. The live haulers lost their jobs as a result of the plant closing. The live haulers were an essential part of Fort Halifax's integrated operation. Although much of the physical activity required by their job occurred off the premises of the Winslow plant, their performance constituted an integral part of the operation of the plant. The live haulers met at the Winslow plant and received instructions at the Winslow plant. They then went to outlying farms and "caught" the chickens needed for the production line of the plant. On these facts, the Court finds that the live haulers were employees at a "covered establishment" who are entitled to severance pay.

The final category consists of the administrative employees: Arthur Simpson, Norris Willette, Larry Corbin, David Gagnon, Fernando Roderique, Trene Boucher, Michael Aglio, Edward Daigle, Erwin Emery, and Eugene Bourgoin. Defendant does not dispute that the administrative employees worked at a "covered establishment" and are entitled to severance pay. Rather, defendant contends that these employees have been paid severance pay pursuant to express contracts between defendant and the administrative employees. Section 625-B(3)(B) provides that no liability for severance pay exists under the statute if an eligible employee "is covered by an express contract for severance pay."

Contrary to defendant's contentions, the evidence does not support the conclusion that the administrative employees and

defendant were parties to express contracts providing for severance pay. While defendant may have occasionally paid one month's salary to administrative employees who had been terminated other than for cause, there is no indication of any written or oral agreement between defendant and its employees concerning severance pay.

Despite the absence of an express agreement, defendant did pay some administrative employees money in addition to their earned salary after the plant ceased operations. Although these payments do not establish the existence of an express agreement, the parties have agreed that these payments along with unearned vacation pay must be subtracted from gross pay before obtaining the weekly average used to compute the total severance pay due pursuant to section 625-B(1)(H) and (2).

Finally, with respect to all employees defendant argues that if it is liable for severance pay, the liability extends only for years worked after 1975 when the severance pay statute achieved what is essentially its present form. The important time period in the statute is the number of years the employee worked at a "covered establishment" before termination. Although this time period may extend back beyond the 1975 amendment and although defendant will be liable to employees for years the employees worked at the "covered establishment" before defendant acquired the Winslow plant, this result is perfectly consistent with the purpose of the statute. In this case, the State seeks to apply the statute only to a termination occurring after the statute's enactment and amendments. There is no problem with retroactive application of the statute.

Accordingly, judgment is entered against defendant and in favor of the State for the benefit of the individual named em-

ployees in the following amounts together with interest and costs:

Robert Cummings	$1,874.85
Harold Hubbard	4,428.96
Larry Hubbard	2,222.57
Wilfred Morey	1,700.10
Edgar Pooler	748.62
Robert Richardson	1,982.54
Winslow Tobey	2,289.28
Lawrence Roy	4,518.24
William Bird	1,428.95
Durwood Dow	750.60
Edison Hubbard	826.71
Arthur Simpson	8,347.43
Norris Willette	4,482.75
Larry Corbin	5,041.92
David Gagnon	4,400.00
Fernando Roderique	5,972.95
Trene Boucher	1,300.90
Michael Aglio	3,395.79
Edwin Daigle	3,686.41
Erwin Emery	1,017.68
Eugene Bourgoin	8,667.60
Mary Cummings	648.92
Alice Gurney	4,391.28
Sharon Hutting	1,307.52
Nelsom Frappier	1,665.28
Raymond Bourgoin	6,562.08
Owen Wentworth	981.76
Ernest Willette	3,791.90
Michael Willette	747.87
Carrol Carey	5,870.18
Raymond Cayouette	6,547.44

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

Dorothy Dyer	$4,667.00
Bronnick Kibbin	2,830.62
Regional Pooler	6,378.69
Leo Giguere	5,495.04
Frank Bickford	7,006.44
Jerry Grivois	580.44
Lucien Bard	2,247.96
Alfred Landry	2,197.56
Norman Madore	708.28
Allen Mullen	889.65
Robert Myers	840.70
Dana Nelson	1,028.60
Clarence Hachey	3,977.76
Steven Harrison	784.04
Gregory Ivory	841.25
Larry Allen	1,450.72
Gary Gagnon	719.60
Rita York	2,114.88
Warren York	2,142.60
George McAdoo	1,026.24
Rhonda Porter	649.80
Joan Hudson	3,886.54
Elizabeth Kelly	1,113.21
Deborah Lamontagne	1,091.23
Sally Goguen	702.44
Arlene Grandmaison	520.47
Rebecca Greene	2,652.00
Laura Grivois	885.10
Mavis Hanning	856.25
Norma Frappier	1,068.78
Joan Gagnon	3,113.89
Darhlene Crain	832.20
Dorothy Fields	526.86

Rolande Folsom	$4,174.73
Bertha Knowles	1,364.40
Charles Anderson	4,964.96
Sylvia Anderson	3,890.64
Lawrence Belanger	3,563.70
Carol Sawtelle	674.35
Jacqueline Vashon	810.30
Muriel Vigue	1,818.30
Ruth Poulin	493.77
Jean Bard	3,027.96
Mary Berube	1,875.25
David Breton	1,413.96
Nancy Duplissee	490.26
Rose Giguere	3,854.57
John Thomas	2,936.16
Audrey Tyler	3,767.10
Roland Grenier	8,680.36
Charlene Sweet	1,592.03
Bruce Tibbetts	1,820.06
Clyde Young	7,164.82
Jeannie Labbe	495.51

Dated: May 2, 1985.

DANIEL E. WATHEN
Justice, Superior Court

APPENDIX C

October 29, 1982—Opinion and Order of the Superior Court for Kennebec County, Maine

STATE OF MAINE

SUPERIOR COURT

KENNEBEC, ss

CIVIL ACTION
Docket No. CV81-516

MARVIN W. EWING,

Plaintiff

—v.—

FORT HALIFAX PACKING COMPANY, *et al.*,

Defendants

OPINION AND ORDER

This matter is before the Court as a result of a suit by the Director of the Bureau of Labor Standards of the State of Maine, Department of Labor on behalf of former employees of Defendants, Fort Halifax Packing Company and Corbett Brothers, Inc. to recover severance pay for these employees pursuant to 26 M.R.S.A. § 625-B(5). The parties have filed cross motions for summary judgment and other motions which seek to reach the merits of the dispute.

Review of the depositions, responses to interrogatories and other pleadings discloses the following significant facts:

Defendants, Fort Halifax and Corbett Brothers, produced and processed poultry and poultry products in Maine from May

1972 until May 23, 1981. The principal facilities in this operation were a poultry processing and packing plant at Winslow, Maine (the Fort Halifax plant), an egg packing plant and two hatcheries in Winslow and two feed mills. Only the Fort Halifax plant operated by Defendant Fort Halifax Packing Company employed more than 100 people at a single facility from May 23, 1980 to May 23, 1981. All the facilities combined employed approximately 200 people in that time period.

On May 23, 1981, Defendants ceased all poultry operations and laid off all of the approximately 200 employees except several maintenance men and clerical employees. In June 1981, Defendants sold their egg packing plant, one hatchery, one feed mill, inventory and rolling stock to Corbett Farms.

Defendants, Fort Halifax and Corbett Brothers, are part of a larger corporation known as Corbett Enterprises, a Missouri corporation with its principal place of business at Hartford, Connecticut. Fort Halifax is a wholly owned subsidiary of Corbett Enterprises and Corbett Brothers is a wholly owned subsidiary of Fort Halifax.

Corbett Brothers supplied Fort Halifax with broilers which were processed at the Fort Halifax plant. Broiler eggs were hatched at the Corbett Brothers hatcheries. Once hatched, the chicks were then moved to farms where they were grown by individual farmers pursuant to a contractual agreement. When the chicks had grown into broilers, they were shipped by a truck to the Fort Halifax plant where they were processed. Corbett Brothers also packed table eggs grown on independent farms.

The Maine severance pay statute provides, in part that:

> Any employee [sic] who . . . terminates a covered establish-

> ment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. 26 M.R.S.A. § 625-B(2).

While Defendants dispute that their operations have terminated, Defendants have admitted that all poultry and related operations ceased in May of 1981. Defendants have not grown or processed poultry for over seventeen (17) months. They have no definite plans to reopen.

With the exception of several maintenance employees, Defendants have not recalled any of the employees laid off in May of 1981. Pursuant to the collective bargaining agreement between Fort Halifax and Local 385, union members lost all seniority rights after being on lay off for over one year. (Agreement, Article V, section 6).

Addition of Corbett Enterprises to the Suit

As a preliminary procedural matter, the State seeks to join Corbett Enterprises as a party defendant. As the parent corporation of the present Defendants, Corbett Enterprises is an "employer" within the meaning of 26 M.R.S.A. § 625-B(1)(C). Corbett Enterprises is a "person who directly or indirectly owns and operates a covered establishment," 26 M.R.S.A. § 625-B (1)(C), and is thus liable for severance pay. 26 M.R.S.A. § 625-B(2).

Corbett Enterprises has been directly involved in the present litigation. It loaned substantial funds to Fort Halifax Packing Company, Inc., to pay off creditors. It has been paying some employee benefits. Harvey A. McGuire, Jr., a project manager for Corbett Enterprises, has assisted in reorganization of the

Maine operations. The Board of Directors of Corbett Enterprises has been involved in restructuring the Maine operations.

This close organizational and working relationship among Fort Halifax Packing Company, Inc., Corbett Brothers, Inc. and Corbett Enterprises justifies joining Corbett Enterprises as a party defendant. There can be no question that Corbett Enterprises has sufficient contacts with the State to give this Court jurisdiction of their operation, 14 M.R.S.A. § 704-A, see *Tyson* v. *Whitaker & Son, Inc.*, Me., 407 A.2d 1 (1979). Thus, the State's motion to amend their complaint, and to join Corbett Enterprises as a party defendant will be granted. The State must, of course, serve Corbett Enterprises with the appropriate pleadings, as amended, and this should be accomplished within 20 days of this order.

Validity of § 625-B(2)

In examining the legal issues, the Court must initially address two general objections which the Defendants raise to application, to them, of the severance pay statute. 26 M.R.S.A. § 625-B(2). The first objection is that Maine severance pay law is preempted by the Federal Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., and thus invalid under the Supremacy Clause, Art. VI of the United States Constitution. The second is that the Maine statute has federal constitutional defects because of alleged retroactive application and due process and contract interference problems.

ERISA

The Federal Employment Retirement Income Security Act, supra establishes certain standards for benefit and pension plans where they exist. It does not compel establishment of such plans. It would take a truly strained view of ERISA, which was

designed to protect and preserve employee benefit rights, to interpret it to overturn a state law protecting discharged employees and to deprive those employees of the meager benefits established under state law.

The tensions inherent in the constitution between the Supremacy Clause and the Tenth Amendment have been exacerbated in recent years as increasing numbers of special interest groups have successfully pressed their clients in Congress to preempt a wide range of state laws enacted to protect the public interest. This headlong rush of Congress to preempt state laws and centralize control of many matters in Washington, where the power of special interests is most easily brought to bear, may cause some courts to reconsider and revive the long dormant provisions of the Tenth Amendment. However, in this case, neither the face of the statute, nor its legislative history supports the Defendants' position on preemption.

Defendants claim the severance pay statute is unenforceable by virtue of 29 U.S.C. § 1144(a) which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title . . .

The subject targeted in ERISA is the employer-employee relationship as expressed in private benefit plans, not state statutes enacted pursuant to the police power to alleviate the impact of job termination. 29 U.S.C. § 1003(a). The severance pay provisions of 26 M.R.S.A. § 625-B are not employee benefit plans as defined in 29 U.S.C. § 1002. These provisions

are not "plans" and are not "established or maintained" by an "employer" or an "employee organization." ERISA, in fact, only addresses severance pay indirectly by reference to 29 U.S.C. § 186(c), 29 U.S.C. § 1002(1)(B). This section of the Labor Management Relations Act proscribes certain financial transactions between employers and employee representatives. Section 186(c)(6) of Title 29, excludes from the restrictions

> . . . money or other things of value paid by any employer to a trust fund established by such representative [of his employees] for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs . . .

The emphasis once again is on employer-employee developed programs. The effect of 29 U.S.C. § 1002(1)(B) is to include within the definition of "employee welfare benefit plan" "those *plans* which provide holiday and severance benefits . . ." 29 C.F.R. § 2510.3-1(a)(3). (emphasis added)

The Maine severance pay statute does not operate at all in instances where employers and employees have an "express contract providing for severance pay." 26 M.R.S.A. § 625-B (3)(B). Thus, while the statute addresses the problem of severance pay, it does not regulate any employee benefit plan described in ERISA or otherwise relate to employee benefit plan[s] which are the subject matter regulated by ERISA, cf. 29 U.S.C. § 1144(a); *Bell* v. *Employee Security Benefit Association*, 437 F.Supp. 382, 392 (D. Kan. 1977).

The ERISA preemption issue has been subject to varying interpretation by courts and commentators, cf. *Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980); aff'd — U.S. —, 102 S.Ct. 79 (1981). (ERISA preempts

laws conferring benefits); *Wadsworth* v. *Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978) (ERISA does not preempt state law applicable to group insurance policies purchased by employee benefit plans); *Gast* v. *State*, 36 Ore. App. 441, 585 P.2d 12 (1978) (ERISA does not preempt law requiring pregnancy and childbirth benefits); Hutchinson and Ifshin, "Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974," 46 U.Chi.L.Rev. 23 (1978); Note, "ERISA Preemption of State Law: The Meaning of Relate To in Section 514," 58 Wash.U.L.Q. 143 (1980).

The ERISA preemption issue was presented to the U.S. Supreme Court in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 68 L.Ed.2d 402 (1981). The Court held therein that a New Jersey statute which prohibited offsets of retirement and workers' compensation benefits was "relate[d] to pension plans" and therefore preempted by ERISA, 68 L.Ed.2d at 416-417. The Court declined to determine the "outer bounds of ERISA's pre-emptive language" and noted that other courts had reached varying conclusions as to the meaning of the pre-emptive language. Id. at 417-418 and n.21.

Maine's severance pay statute § 625-B(2) addresses the vital state interest of protecting the economy and workers from the impact of a business leaving a community; is not inconsistent with the national policy expressed in ERISA; and does not affect directly any employee benefit plan, therefore it is not preempted by ERISA.

Constitutional Issues

The general constitutional questions raised by the Defendants—due process, equal protection, impairment of contracts,

improper exercise of police power—have basically been resolved by the Law Court, against the Defendants' position, in *Shapiro Brothers Shoe Co.* v. *Lewiston-Auburn Shoeworkers Protective Association*, Me., 320 A.2d 247 (1974). Further, there is no problem here of retroactive application. The State is not seeking to apply the severance pay compensation provisions to terminations which occurred prior to enactment of the severance pay law. The law is only setting a standard of compensation levels for those who are terminated and otherwise eligible for compensation in accordance with the severance pay statute.

"Covered Establishment" Question

With Defendants general challenges to the applicability of the severance pay statute rejected, the Court turns to the central legal issue of this case—what might be best described as the segregation-integration issue. The severance pay statute does not cover every industrial or commercial facility. It is limited in application to a "covered establishment."

Pursuant to § 625-B(1)(A) "covered establishment" means: "any industrial or commercial facility or part thereof which employs or has employed at any time in the preceding 12-month period 100 or more persons." The term "employer" is separately defined at § 625-B(1)(C) as "any person who directly or indirectly owns and operates a covered establishment." The State argues that Fort Halifax and Corbett Brothers function as one fully integrated business operation, albeit at several locations. Because they are a fully integrated operation, the State argues that this entire business is the "covered establishment" and that therefore all employees of Fort Halifax and

Corbett Brothers are eligible for severance pay pursuant to § 625-B(2).

At oral argument, the State urged that this expansive definition of the term "covered establishment" promotes the salutary policy goal of the Legislature to make severance pay available to discharged employees. It is, of course, up to the Legislature to determine—subject to equal protection and due process requirements—the appropriate scope of coverage of the severance pay requirement, and it does not appear that the Legislature intended to go as far as the State suggests in this case. Under the State's construction any "employer" which employed 100 or more persons, would be liable for severance pay if the employer's business operation was terminated, regardless of how many facilities were involved in the business operation. Such an interpretation would render the definition of "covered establishment" § 625-B(1)(A) surplusage since the ends asserted by the State could be accomplished by defining the term employer as "any person who has employed 100 or more persons."

Instead, the definition "covered establishment" appears to be a limitation on the general definition of employer which suggests that the employer's operations ought to be broken down and that each individual facility is to be examined to determine eligibility for severance pay. Only through this interpretation does the term "covered establishment" have independent, viable meaning in the statutory context. Since courts must seek interpretations of statutes which give meaning to every term in the statute, *Labbe* v. *Nissen Corp.*, Me., 404 A.2d 564 (1979); *National Newark and Essex Bank* v. *Hart*, Me., 309 A.2d 512 (1973), the Court is bound to adopt this narrower interpretation. That interpretation is further confirmed by examination of the definition "covered establishment" itself

which speaks, in the singular, of "any industrial or commercial facility or part thereof." This again suggests a breakdown of the employer's operations to specific facilities, and then examination of each specific facility to determine if it falls above or below the 100 employee eligibility line for severance pay. Thus, only individual facilities which terminate operations and which at the time of termination have employed 100 or more persons at any time within the past 12 months are covered establishments, § 625-B(1)(A) that will be required to pay severance pay to their terminated employees pursuant to § 625-B(2).

With this interpretation, it appears that there are no disputes as to material facts that no single Corbett Brothers facility employed 100 or more persons at any time relevant to this proceeding. Instead, the Corbett Brothers employees were distributed through several separate facilities; the largest of which may have employed 40 persons. Thus, even assuming that the parent corporation, Corbett Enterprises, is the "employer" pursuant to § 625-B(1)(C), no person who worked at the Corbett Brothers facility would be eligible for severance pay because no Corbett Brothers facility employed 100 or more persons in the 12 months immediately preceding May 23, 1981. Accordingly, the Court will grant the Defendants' motion for summary judgment as to the Corbett Brothers employees.

The remaining issue is whether there are any disputes as to material fact as to the eligibility status of persons who were employed at the Fort Halifax plant and related offices prior to May 23, 1981. Review of the depositions, responses to interrogatories and affidavits in the file has convinced the Court that there are no disputes as to material fact that as of May 23, 1981 the Fort Halifax plant then employed, or had employed at some time in the preceding 12-month period, 100 or more persons. While the exact number of persons so employed can-

not be determined with certainty, it does appear certain that the threshold 100 number was crossed making the Fort Halifax plant a "covered establishment" as that term is defined in § 625-B(1)(A).

The Defendants object that the Fort Halifax plant is not in fact a "covered establishment" because it is not an industrial or commercial facility, but rather an agricultural operation not covered by § 625-B(1)(A). However, it appears to be well established by precedent in Maine and elsewhere that a facility which processes agricultural products is not thereby rendered an agricultural facility to exempt it from coverage of laws which make distinctions on coverage according to the status of a facility as an agricultural versus an industrial or commercial facility. *C.M.T. Co., Inc.* v. *Maine Employment Security Commission*, 156 Me. 218 (1960); *N.L.R.B.* v. *Scott Paper Co.*, 440 F.2d 625, 626 n.3 (1st Cir. 1971); *N.L.R.B.* v. *Gass*, 377 F.2d 438, 444 (1st Cir. 1969); *Hinson* v. *Creech*, 209 S.E.2d 471 (N.C. 1974); *Chicago R.I. and P.Y. Co.* v. *State*, 201 P. 260 (Okla. 1921), compare *Drummonds Poultry Transportation Service* v. *Wheeler*, 178 F.Supp. 12 (D. Me. 1959). Thus, the Court determines that there are no disputes as to material fact that the Fort Halifax plant and related operations constitute an industrial or commercial facility as that term is applied in § 625-B(1)(A).

The Defendants also urge that even if the Fort Halifax facility is a covered establishment, its operations have not been terminated to such a degree that the employees are eligible for severance pay under § 625-B(2). "Termination" is defined in § 625-B(1)(G) as "the substantial cessation of industrial or commercial operations in a covered establishment." In this case, while some minor clerical and maintenance operations have

continued, there is no dispute that the industrial or commercial operations—the processing of poultry—has ceased. Defendants argue that the operation has not really closed but that it is simply awaiting a rejuvenation in the economics of the broiler industry in order to reopen its doors and begin operations again. There is no dispute, however, that the plant has now been closed for seventeen (17) months. At oral argument on the cross motions, counsel for the Defendants honestly conceded that at some point in time the length of closure of a facility would be such as to render it closed, or terminated, for purposes of application of § 625-B(1)(G). The Court concludes that even without regard to the other incidents of closure which became apparent on May 23, 1981 or immediately thereafter, the length of time that the facility has remained closed without any plan or immediate prospects of reopening, now seventeen (17) months, makes the facility a closed facility and the industrial or commercial operations terminated operations for purposes of effectiveness of the severance pay statute.

Therefore, the Court determined that, as to the employees at the Fort Halifax packing facility, there are no disputes as to material facts that these employees are eligible for severance pay in accordance with the provisions of 26 M.R.S.A. § 625-B (2). Accordingly, summary judgment will be granted for the State as to the employees at the Fort Halifax processing plant.

Because substantial sums of money may be involved in this matter, and because the interests of the terminated employees who are eligible for severance pay would be best served by a prompt determination of their claims and entry of final judgment in this court, the interests of justice would be served by expediting determination of the claims made on behalf of the terminated Fort Halifax processing plant employees. Accordingly, the Court requests that the parties meet and then advise

the Court, either separately or together, no later than November 23, 1982 as to:

—the remaining discovery, if any, which needs to be done to identify potentially eligible former employees and their terms of service.

—the remaining disputes, if any, as to material facts relating to (a) the eligibility of particular employees and (b) the amount to which each employee would be entitled to pursuant to § 625-B(2).

—the amount of time anticipated before each party would be ready for trial on the remaining disputed facts, if any; and

—the length of time which it would be expected that such a trial, if any is needed, would take.

Therefore, the Court ORDERS and the entry shall be:

1. Defendants' motion to dismiss is DENIED.

2. Plaintiff's motion to amend to add Corbett Enterprises as a party defendant is GRANTED. If service cannot be made by agreement, Plaintiff shall effect service of the amended complaint upon Corbett Enterprises within 20 days.

3. Judgment for the Defendants, that the former employees of Corbett Brothers are not eligible for severance pay.

4. Judgment for the Plaintiff, that the former employees of the Fort Halifax poultry processing and packing plant are eligible for severance pay, subject to further determination as to the specific employees eligible to receive severance pay and the amount of severance pay that those employees should receive.

5. In all other respects the Plaintiff's motion for summary judgment and the Defendants' motion for summary judgment are DENIED.

6. The parties shall notify the Court by November 23, 1982 as to the actions that are necessary to resolve the remaining outstanding issues in accordance with the terms of this opinion.

Dated: October 29, 1982

DONALD G. ALEXANDER
Justice, Superior Court

APPENDIX D

August 1, 1986—Notice of Appeal to this Court

IN THE
LAW COURT OF THE SUPREME JUDICIAL COURT
STATE OF MAINE

LAW DOCKET NO. KEN-85-216

DECISION NO. 4142

FORT HALIFAX PACKING COMPANY, INC.,
Appellant

—v.—

MARVIN W. EWING,
Appellee

and

FORT HALIFAX PACKING COMPANY, INC.,
Appellant

—v.—

RAYMOND BOURGOIN, *et al.*
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Fort Halifax Packing Company, Inc., the above-named appellant, appeals to the Supreme Court of the United States from the final judgment of the Maine Supreme Judicial Court in the captioned action, decided and entered on June 2, 1986, modifying and affirming a judgment

rendered in the Superior Court, Kennebec County, granting severance pay to certain of the appellant's employees pursuant to 26 M.R.S.A. § 625-B.

Appeal is taken to the United States Supreme Court under the authority of the United States Code, title 28, section 1257(2).

THE APPELLANT—FORT HALIFAX
PACKING COMPANY, INC.

By JOHN C. YAVIS, JR.

and

By THOMAS M. CLOHERTY

Both of:

Murtha, Cullina, Richter and Pinney
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone: (203) 240-6000
Its Attorneys

CERTIFICATION

I, Thomas M. Cloherty, a member of the Bar of the United States Supreme Court, hereby certify pursuant to United States Supreme Court Rules 10.2 and 28 that on this 1st day of August, 1986, I caused to be deposited in a United States mailbox copies of the foregoing Notice of Appeal to the Supreme Court of the United States addressed to Office of the Clerk, Superior Court of Kennebec County, Kennebec County Courthouse, 95 State Street, Augusta, Maine 04330 which is the court "possessed of the record"; James E. Tierney, Attorney General, State of Maine, and Thomas D. Warren, Assistant Attorney General, State of Maine, State House Station #6,

August 1, 1986—Notice of Appeal to this Court

Augusta, Maine 04333; Attorney Martha Geores, Bell & Geores, 277 Lisbon Street, Lewiston, Maine 04240; and Attorney Linda D. McGill, Richard G. Moon, Esquire and John H. Rich, III, Esquire, Perkins, Thompson, Hinckley & Keddy, One Canal Plaza, P.O. Box 426, Portland, Maine 04112-0426.

THOMAS M. CLOHERTY

Subscribed and sworn to before me, this 1st day of August, 1986.

Notary Public: GINA LEONE

My Commission Expires
4/1/90

APPENDIX E

Statutes Involved

26 M.R.S.A. § 625-B

§ 625-B. Severance pay

1. DEFINITIONS. As used in this section, unless the context otherwise indicates, the following words shall have the following meanings.

A. "Covered establishment" means any industrial or commercial facility or part thereof which employs or has employed at any time in the preceding 12-month period 100 or more persons.

B. "Director" means the Director of the Bureau of Labor.

C. "Employer" means any person who directly or indirectly owns and operates a covered establishment.

D. "Person" means any individual, group of individuals, partnership, corporation, association or any other entity.

E. "Physical calamity" means any calamity such as fire, flood or other natural disaster, or the final order of any federal, state or local governmental agency including adjudicated bankruptcy.

F. "Relocation" means the removal of all or substantially all of industrial or commercial operations in a covered establishment to a new location, within or without the State of Maine, 100 or more miles distant from its original location.

G. "Termination" means the substantial cessation of industrial or commercial operations in a covered establishment.

H. "Week's pay" means an amount equal to 1/52nd part of the gross wages paid to an employee during the 12 months prior to relocation or termination.

2. Severance pay. Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. The severance pay to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law.

3. Mitigation of severance pay liability. There shall be no liability for severance pay to an eligible employee if:

A. Relocation or termination of a covered establishment is necessitated by a physical calamity;

B. The employee is covered by an express contract providing for severance pay;

C. That employee accepts employment at the new location; or

D. That employee has been employed by the employer for less than 3 years.

4. Suits by employees. Any employer who violates the provisions of this section shall be liable to the employee or employees affected in the amount of their unpaid severance pay. Action to recover the liability may be maintained against any employer in any state or federal court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and any other employees similarly situated. Any labor organization may also maintain an action on behalf of its members. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a

reasonable attorney's fee to be paid by the defendant and costs of the action.

5. Suits by the director. The director is authorized to supervise the payment of unpaid severance pay owing to any employee under this section. The director may bring an action in any court of competent jurisdiction to recover the amount of any unpaid severance pay. The right provided by subsection 4 to bring an action by or on behalf of any employee, and of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the director in an action under this subsection, unless the action is dismissed without prejudice by the director. Any sums recovered by the director on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the director, directly to the employee affected. Any sums thus recovered not paid to an employee because of liability to do so within a period of 3 years shall be paid over to the State of Maine.

6. Notice of director. Any person proposing to relocate or terminate a covered establishment shall notify the director in writing not less than 60 days prior to the relocation.

6-A. Notice to employees and municipality. Any person proposing to relocate a covered establishment outside the State shall notify employees, and the municipal officers of the municipality where the plant is located, in writing not less than 60 days prior to the relocation. Any person violating this provision commits a civil violation for which a forfeiture of not more than $500 may be adjudged, provided that no forfeiture may be adjudged if the relocation is necessitated by a physical calamity, or if the failure to give notice is due to unforeseen circumstances.

7. Powers of director. In any investigation or proceeding under this section, the director shall have, in addition to all

other powers granted by law, the authority to examine books and records of any employer affected by this section as set out in section 665, subsection 1.

* * * * *

29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

* * * * *

29 U.S.C. § 158

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an

employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle

or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is

failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay

or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising

the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event

such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) and (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his

status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in

this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon the employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such

employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

* * * * *

29 U.S.C. § 1002

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for

the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

29 U.S.C. § 1003

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons, substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

* * * * *

29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provision of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b)

of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contribution, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer

welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX F

November 30, 1981—Answer in *Ewing* v. *Fort Halifax Packing Company, Inc.*

SUPERIOR COURT

STATE OF MAINE

KENNEBEC, SS.

CIVIL ACTION

DOCKET NO. 81-516

MARVIN W. EWING, Director, Bureau of Labor Standards, Maine Department of Labor, State of Maine, Augusta, Maine,

Plaintiff

—v.—

FT. HALIFAX PACKING COMPANY, INC.

and

CORBETT BROTHERS, INC.,

Defendants

ANSWER

NOW COME Defendants Ft. Halifax Packing Company, Inc. (correctly, "Ft. Halifax Packing Company") and Corbett Brothers, Inc. (correctly, "Corbett Brothers") and answer Plaintiff's Complaint as follows:

1. Defendants admit that Plaintiff is bringing an action pursuant to 26 M.R.S.A. § 625-B but deny that they are liable for severance pay under the statute. Defendant Ft. Halifax

Packing Company further states that its correct name is "Ft. Halifax Packing Company."

2. Defendants admit the allegations set forth in paragraph two of Plaintiff's Complaint.

3. Defendants admit the allegations set forth in paragraph three of Plaintiff's Complaint.

4. Defendants admit the allegations set forth in paragraph four of Plaintiff's Complaint.

5. Defendants deny each and every allegation set forth in paragraph five of Plaintiff's Complaint except that Defendants admit that on or about May 23, 1981, Defendant Ft. Halifax Packing Company temporarily shut down its plant in Winslow, Maine and employees were temporarily laid off.

6. Defendants deny each and every allegation set forth in paragraph six of Plaintiff's Complaint.

7. Defendants deny each and every allegation set forth in paragraph seven of Plaintiff's Complaint except that Defendants admit that they have been attempting to restructure the ownership and financing of Ft. Halifax Packing Company and Corbett Brothers. Defendants further admit that, effective June 1, 1981, a portion of the assets of Corbett Brothers were sold and have continued their poultry operations without interruption.

8. Defendants deny each and every allegation set forth in paragraph eight of Plaintiff's Complaint.

9. Defendants deny each and every allegation set forth in paragraph nine of Plaintiff's Complaint.

10. Defendants deny each and every allegation set forth in paragraph ten of Plaintiff's Complaint except that Defendants admit that no severance payments have been made.

FIRST AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint fails to state a claim upon which relief may be granted to Plaintiffs.

SECOND AFFIRMATIVE DEFENSE

12. Ft. Halifax Packing Company is not a "covered establishment" as that term is defined in 26 M.R.S.A. § 625-B(1)(A) because it is not an "industrial or commercial facility."

THIRD AFFIRMATIVE DEFENSE

13. Corbett Brothers is not a "covered establishment" as that term is defined in 26 M.R.S.A. § 625-B(1)(A) because it is not an "industrial or commercial facility."

FOURTH AFFIRMATIVE DEFENSE

14. Corbett Brothers is not a "covered establishment" as that term is defined in 26 M.R.S.A. § 625-B(1)(A) because it has not "employed at any time in the preceding 12-month period 100 or more persons" in a "covered establishment."

FIFTH AFFIRMATIVE DEFENSE

15. Ft. Halifax Packing Company has not "relocated" its operations as that term is defined in 26 M.R.S.A. § 625-B (1)(F) because it has not removed "all or substantially all of its industrial or commercial operations in a covered establishment to a new location . . ."

16. Ft. Halifax Packing Company has not "terminated" its operations as that term is defined in 26 M.R.S.A. § 625-B (1)(G) because it has not effectuated a "substantial cessation of industrial or commercial operations in a covered establishment."

17. Absent a relocation or termination of a covered establishment within the meaning of 26 M.R.S.A. § 625-B, the said statutory provision is inapplicable to Defendants.

SIXTH AFFIRMATIVE DEFENSE

18. Corbett Brothers has not "relocated" its operations as that term is defined in 26 M.R.S.A. § 625-B(1)(F) because it has not removed "all or substantially all of its industrial or commercial operations in a covered establishment to a new location . . ."

19. Corbett Brothers has not "terminated" its operations as that term is defined in 26 M.R.S.A. § 625-B(1)(G) because it has not effectuated a "substantial cessation of industrial or commercial operations in a covered establishment."

20. Absent a relocation or termination of a covered establishment within the meaning of 26 M.R.S.A. § 625-B, the said statutory provision is inapplicable to Defendants.

SEVENTH AFFIRMATIVE DEFENSE

21. Plaintiff-employees continue to be employees of Defendants, laid off on temporary basis, because they still receive pension and other benefits incident to their employment, thereby waiving any claims that their employment may have been terminated.

EIGHTH AFFIRMATIVE DEFENSE

22. To the extent that any employees of Ft. Halifax Packing Company and Corbett Brothers have been employed for less than three years or have experienced an interruption in their employment within the three years prior to May 23, 1981, those employees qualify as employees "employed by the employer for less than three years."

23. Where employees have been employed for less than three years at the time their employment is terminated, within the meaning of 26 M.R.S.A. § 625-B, the severance pay benefits of that section are not available.

NINTH AFFIRMATIVE DEFENSE

24. Plaintiff's Complaint purports to allege a claim based on 26 M.R.S.A. § 625-B, which statutory provisions are invalid because they attempt to regulate employee benefit plans within the exclusive regulation of the Employees Retirement Income Security Act of 1974 which federal statute expressly pre-empts and supersedes state law.

TENTH AFFIRMATIVE DEFENSE

26. Application of the severance pay statute, 26 M.R.S.A. § 625-A as enacted by P.L. 1973, ch. 545, effective October 3, 1973 and as amended by P.L. 1975, ch. 512, effective October 1, 1975 in a retroactive manner to allow Plaintiff to recover statutory damages based on time worked prior to the enactment of the above referenced provision of the statute would unconstitutionally impair the obligation of contract in violation of the United States Constitution, Article I, Section 10 and the Maine Constitution, Article I, Section 11.

ELEVENTH AFFIRMATIVE DEFENSE

26. Application of the severance pay statute, 26 M.R.S.A. § 625-A as enacted by P.L. 1973, ch. 545, effective October 3, 1973 and as amended by P.L. 1975, ch. 512, effective October 1, 1975 in a retroactive manner to allow Plaintiff to recover statutory damages based on time worked prior to the enactment of the provisions of the statute would deprive Defendants of their property without due process of law in viola-

November 30, 1981—Answer in Ewing v. Fort Halifax Packing Company, Inc.

tion of the Fourteenth Amendment to the United States Constitution and Article I, Section 6-A of the Maine Constitution.

WHEREFORE, Defendants demand judgment dismissing the Complaint herein against them, together with the costs and disbursements of this action and for such other and further relief as this Court deems just and proper.

Dated at Portland, Maine this 30th day of November, 1981.

SIDNEY ST. F. THAXTER
DEBORAH M. MANN
THAXTER LIPEZ STEVENS BRODER & MICOLEAU
One Canal Plaza
Portland, Maine 04112
(207) 775-2361

Attorneys for Defendants

81-322-001

January 18, 1982—Answer in *Bourgoin* v. *Ft. Halifax Packing*

STATE OF MAINE

SUPERIOR COURT

KENNEBEC, SS.

CIVIL ACTION
DOCKET NO.

RAYMOND BOURGOIN, *et al.*,

Plaintiffs

—v.—

FT. HALIFAX PACKING,

Defendant

ANSWER

NOW COMES Defendant, Ft. Halifax Packing (correctly, "Fort Halifax Packing Company") and answers Plaintiffs' Complaint as follows:

1. Defendant denies each and every allegation of paragraph one of Plaintiffs' Complaint except that Defendant admits that Plaintiffs intend the above-captioned action to be brought to recover severance pay.

2. Defendant denies each and every allegation of paragraph two of Plaintiff's Complaint except that Defendant admits that Raymond Bourgoin is an employee of Fort Halifax Packing Company and that the duration of his employment is as stated in the Company's records.

3. Defendant denies each and every allegation of paragraph three of Plaintiff's Complaint except that Defendant admits that Clarence Hachey is an employee of Fort Halifax Packing

Company and that the duration of his employment is as stated in the Company's records.

4. Defendant denies each and every allegation of paragraph four of Plaintiff's Complaint except that Defendant admits that Reginald Pooler is an employee of Fort Halifax Packing Company and that the duration of his employment is as stated in the Company's records.

5. Defendant denies each and every allegation of paragraph five of Plaintiff's Complaint except that Defendant admits that Audrey Tyler is an employee of Fort Halifax Packing Company and that the duration of her employment is as stated in the Company's records.

6. Defendant denies each and every allegation of paragraph six of Plaintiff's Complaint except that Defendant admits that Dorothy Dyer is an employee of Fort Halifax Packing Company and that the duration of her employment is as stated in the Company's records.

7. Defendant denies each and every allegation of paragraph seven of Plaintiff's Complaint except that Defendant admits that Debbie Lamontagne is an employee of Fort Halifax Packing Company and that the duration of her employment is as stated in the Company's records.

8. Defendant denies each and every allegation of paragraph eight of Plaintiff's Complaint except that Defendant admits that Lawrence Belanger is an employee of Fort Halifax Packing Company and that the duration of his employment is as stated in the Company's records.

9. Defendant denies each and every allegation of paragraph nine of Plaintiff's Complaint except that Defendant admits that Raymond Caouette is an employee of Fort Halifax Packing Company and that the duration of his employment is as stated in the Company's records.

10. Defendant denies each and every allegation of paragraph ten of Plaintiff's Complaint except that defendant admits that Alice Gurney is an employee of Fort Halifax Packing Company and that the duration of her employment is as stated in the Company's records.

11. Defendant denies each and every allegation of paragraph eleven of Plaintiff's Complaint except that Defendant admits that Bertha Knowles is an employee of Fort Halifax Packing Company and that the duration of her employment is as stated in the Company's records.

12. Defendant denies each and every allegation of paragraph twelve of Plaintiff's Complaint except that Defendant admits that Eugene Bourgoin is an employee of Fort Halifax Packing Company and that the duration of his employment is as stated in the Company's records.

13. Defendant denies that its principal place of business is Augusta, Maine, but admits the remaining allegations set forth in paragraph thirteen of Plaintiff's Complaint.

14. Defendant denies each and every allegation set forth in paragraph fourteen of Plaintiffs' Complaint.

15. Defendant admits the allegations set forth in paragraph fifteen of Plaintiffs' Complaint.

16. Defendant denies each and every allegation set forth in paragraph sixteen of Plaintiffs' Complaint.

17. Defendant denies each and every allegation set forth in paragraph seventeen of Plaintiffs' Complaint.

18. Defendant denies each and every allegation set forth in paragraph eighteen of Plaintiffs' Complaint, except that Defendant admits that Plaintiffs are employees of Fort Halifax Packing Company who have been temporarily laid off.

19. Defendant denies each and every allegation set forth in paragraph nineteen of Plaintiffs' Complaint.

20. Defendant denies each and every allegation set forth in paragraph twenty of Plaintiffs' Complaint.

21. Defendant denies each and every allegation set forth in paragraph twenty-one of Plaintiffs' Complaint.

22. Defendant denies each and every allegation of paragraph twenty-two of Plaintiffs' Complaint, except that Defendant admits that no severance payments have been made.

23. Defendant denies each and every allegation set forth in paragraph twenty-three of Plaintiffs' Complaint.

FIRST AFFIRMATIVE DEFENSE

24. Plaintiffs' Complaint fails to state a claim upon which relief may be granted to Plaintiffs.

SECOND AFFIRMATIVE DEFENSE

25. Fort Halifax Packing Company is not a "covered establishment" as that term is defined in 26 M.R.S.A. § 625-B(1)(A) because it is not an "industrial or commercial facility."

THIRD AFFIRMATIVE DEFENSE

26. Fort Halifax Packing Company has not "relocated" its operations as that term is defined in 26 M.R.S.A. § 625-B (1)(F) because it has not removed "all or substantially all of [its] industrial or commercial operations in a covered establishment to a new location . . ."

27. Fort Halifax Packing Company has not "terminated" its operations as that term is defined in 26 M.R.S.A. § 625-B (1)(G) because it has not effectuated a "substantial cessation

of industrial or commercial operations in a covered establishment."

28. Absent a relocation or termination of a covered establishment within the meaning of 26 M.R.S.A. § 625-B, the said statutory provision is inapplicable to any matter alleged in Plaintiffs' Complaint.

FOURTH AFFIRMATIVE DEFENSE

29. Any or all of the Plaintiffs who had ceased and subsequently reinstituted their employment with Fort Halifax Packing Company within three years previous to this action qualify as employees "employed by the employer for less than three years."

30. Where employees have been employed for less than three years at the time their employment is terminated, within the meaning of 26 M.R.S.A. § 625-B, the severance pay benefits of that section are not available.

SIXTH AFFIRMATIVE DEFENSE

31. Plaintiff Eugene Bourgoin is employed in a managerial or supervisory position by Fort Halifax Packing Company.

32. Where persons are employed in supervisory or managerial positions, the provisions of 26 M.R.S.A. §§ 621-629 do not apply to any possible termination of their employment, due to the nature of their employment relationship and position with their employer.

SEVENTH AFFIRMATIVE DEFENSE

33. Plaintiffs' Complaint purports to allege a claim based on 26 M.R.S.A. § 625-B, which statutory provisions are invalid because they attempt to regulate employee benefit plans

within the exclusive regulation of the Employees Retirement Income Security Act of 1974 which federal statute expressly pre-empts and supersedes state law.

EIGHTH AFFIRMATIVE DEFENSE

34. Application of the severance pay statute, 26 M.R.S.A. § 625-A as enacted by P.L. 1973, ch. 545, effective October 3, 1973 and as amended (§ 625-B) by P.L. 1975, ch. 512, effective October 1, 1975 in a retroactive manner to allow Plaintiffs to recover statutory damages based on time worked prior to the enactment of the above referenced provisions of the statute would unconstitutionally impair the obligation of contract in violation of the United States Constitution, Article I, Section 10 and the Maine Constitution, Article I, Section 11.

NINTH AFFIRMATIVE DEFENSE

35. Application of the severance pay statute, 26 M.R.S.A. § 625-A as enacted by P.L. 1973, ch. 545, effective October 3, 1973 and as amended (§ 625-B) by P.L. 1975, ch. 512, effective October 1, 1975 in a retroactive manner to allow Plaintiffs to recover statutory damages based on time worked prior to the enactment of the provisions of the statute would deprive Defendants of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 6-A of the Maine Constitution.

WHEREFORE, Defendant demands judgment dismissing the Complaint herein against it, together with the costs and disbursements of this action and for such other and further relief as this Court deems just and proper.

Dated at Portland, Maine this 18th day of January, 1982.

Sidney St. F. Thaxter
Deborah M. Mann
Thaxter Lipez Stevens Broder & Micoleau
One Canal Plaza
Portland, Maine 04112
(207) 775-2361

Attorneys for Defendant

81-322-001

(3)

No. 86-341

In The
Supreme Court of the United States
October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,
v.
P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, *et al.*,
Appellees.

On Appeal from the Maine Supreme Judicial Court

MOTION OF APPELLEE P. DANIEL COYNE TO DISMISS OR AFFIRM

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
(Counsel of Record)
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
207-289-3661

Attorneys for Appellee
P. Daniel Coyne, Director,
Bureau of Labor Standards,
Maine Department of Labor

October 15, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

24(P)

QUESTIONS PRESENTED

1. Whether a state statute that imposes a one-time obligation to provide severance pay under certain circumstances requires employers to create a private "employee benefit plan" within the meaning of ERISA and is therefore preempted by 29 U.S.C. § 1144(a).

2. Whether a state statute that applies alike to union and non-union workers, that does not interfere with any of the economic self-help weapons available to combatants in a labor dispute, and that imposes certain substantive terms on the employer-employee relationship is preempted by the National Labor Relations Act.

LIST OF PARTIES

The parties are as listed in appellant's jurisdictional statement with one exception: Marvin W. Ewing, listed as appellee in the caption of the jurisdictional statement, has resigned as the Director of Maine's Bureau of Labor Standards and has been succeeded by P. Daniel Coyne. Pursuant to Rule 40.3, Mr. Coyne has been automatically substituted as appellee.

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No. 86-341

In The

Supreme Court of the United States

October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, *et al.*,

Appellees.

On Appeal from the Maine Supreme Judicial Court

MOTION OF APPELLEE P. DANIEL COYNE TO DISMISS OR AFFIRM

Appellee P. Daniel Coyne, Director of the Maine Bureau of Labor Standards, moves to dismiss this appeal or, in the alternative, to affirm the judgment of the Maine Supreme Judicial Court on the ground that this appeal does not present a substantial federal question and does not warrant plenary review.

STATE STATUTE INVOLVED

The Maine severance pay statute, which is codified at 26 M.R.S.A. § 625-B (Supp. 1985), is designed to ease the severe social and economic shock created when a major

employer decides to cease its operations, close its plant, and put its employees out of work.[1] The statute applies to employers who have more than 100 workers and who close their plants or relocate more than 100 miles. 26 M.R.S.A. § 625-B(1)(A), (F), (G). Only employees who have worked at a plant for three years or more are entitled to severance pay, and there is no liability under the statute if an employee is covered by an express contract on the subject of severance pay or if the plant closing results from bankruptcy or natural calamity. 26 M.R.S.A. § 625-B(3)(A), (B), (D). *See* § 625-B(1)(E). The statute requires that each eligible employee be paid one week of severance pay for each year the employee worked at the plant. 26 M.R.S.A. § 625-B(2).

STATEMENT OF THE CASE

Prior to May 1981, the Fort Halifax Packing Company ("Fort Halifax") operated a poultry processing and packaging plant that employed more than 100 employees in Winslow, Maine. Fort Halifax began operating the Winslow plant in 1972, when it purchased the plant and certain other assets from the Ralston Purina Company. The Winslow plant had previously been operated by Ralston Purina from 1961 through 1972 and by the CMT Company, Inc. prior to 1961. Thus, as of May 1981, a number

[1] *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d 247, 254-55 (Me. 1974) (discussing predecessor of current statute).

of Fort Halifax employees had worked continuously at the Winslow processing plant for 20 years or more.

On May 23, 1981 Fort Halifax ceased all processing at the Winslow plant and laid off almost all of its employees. The existing collective bargaining agreement between Fort Halifax and the union which represented its production employees contained no provision for severance pay. There was also no contract or agreement on the subject of severance pay between Fort Halifax and its nonunion supervisory and clerical personnel. Nevertheless, Fort Halifax did not provide severance pay to its employees as required by 26 M.R.S.A. § 625-B.

As of May 1981 Fort Halifax was a wholly-owned subsidiary of Corbett Enterprises, Inc., a holding company whose headquarters are located in West Hartford, Connecticut. Although Fort Halifax employees were covered by two retirement plans maintained by Corbett Enterprises,[2] neither of those plans contained any provision for severance benefits. Moreover, benefits paid by the Corbett retirement plans commence only when an employee dies or reaches retirement age, and no such benefits were paid to Fort Halifax employees as a result of the closing of the Winslow plant.

[2] The first of these retirement plans was for production employees. The second was for sales, administrative, and clerical employees. Both plans provide modest retirement benefits, which are increased if an employee chose to contribute additional amounts while working. At the time the plant closed, employees who made such voluntary contributions were offered the opportunity to request the return of their own contributions. They were not entitled to obtain any amounts contributed by Fort Halifax.

On November 2, 1981 the Director of Maine's Bureau of Labor commenced an action against Fort Halifax to enforce the severance pay law. Fort Halifax thereafter raised, *inter alia*, the defenses of ERISA and NLRA preemption.[3] These defenses were rejected by the trial court and judgment was entered against Fort Halifax on May 2, 1985. Fort Halifax thereafter appealed to the Maine Supreme Judicial Court, which rejected Fort Halifax's preemption claims and affirmed the judgment with minor modifications in an opinion issued on June 2, 1986.

ARGUMENT

Appellant's Preemption Claims Were Correctly Rejected Below and Do Not Warrant Plenary Review.

On this appeal Fort Halifax primarily contends that the Maine severance pay law is preempted by section 514 (a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a). That section "preempts state laws only insofar as they relate to [employee benefit] plans covered by ERISA." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.17 (1983). Because the facts in this case and the relevant statutory language demonstrate that the Maine severance pay law does not relate to an ERISA-covered employee benefit plan, Fort Halifax's claim of ERISA preemption is untenable. Its alternative contention—that the state severance pay law is preempted by the National Labor Relations Act (NLRA)—is foreclosed by this Court's 1985 decision in ***Metropolitan Life Insurance Co. v. Massachusetts***, 105 S.Ct. 2380 (1985). As a result, this appeal should be dismissed for want of a substantial federal question.

[3] The defense of ERISA preemption was raised in the answer filed by Fort Halifax. The defense of NLRA preemption was not raised in the answer but was subsequently raised in the lower court proceedings and was ruled upon by the trial court and the Maine Supreme Judicial Court. *See* Appendix to the Jurisdictional Statement at A9-A14, A23.

1. ERISA Preemption

The doctrine of preemption is based upon the Supremacy Clause, which invalidates state laws that "interfere with, or are contrary to the laws of Congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Preemption exists only when there is an actual conflict between state and federal regulations or when Congress has specifically intended to displace state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-42 (1963). This Court has emphasized that "[p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

In this case Fort Halifax does not argue that there is any conflict between ERISA and the Maine severance pay law. Instead, it contends that the severance pay law is nullified by the express preemption provision contained in 29 U.S.C. § 1144(a). This contention, however, is in-

consistent with the relevant statutory language and is contrary to the legislative history and the underlying policy of the ERISA statute.

The entire focus of ERISA is on privately-created and privately-administered employee benefit plans. Under the statute such plans are divided into two categories: "employee pension benefit plans" and "employee welfare benefit plans." *See* 29 U.S.C. § 1002(1), (2), (3).[4] The statute creates detailed reporting, disclosure, and fiduciary responsibilities that are applicable to both pension and welfare benefit plans. 29 U.S.C. §§ 1021-31, 1101-14. In addition, it mandates specific participation, vesting, and fiduciary requirements for pension plans and establishes a system of insurance to protect the rights of pensioners in the event of a pension plan termination. 29 U.S.C. §§ 1051-86, 1301-68. The overall intent of this legislation was to prevent abuses in privately-administered employee benefit plans, *Massachusetts Mutual Life Ins. Co. v. Russell*, 105 S.Ct. 3085. 3090 n.8 (1985); *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982) (en banc), and to ensure that upon retirement, workers actually receive the pension benefits they have been promised. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374-75 (1980).

Like the ERISA statute itself, ERISA's preemption section focuses on private employee benefit plans. Specifically, it preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). An employee benefit plan covered by ERISA is one which is "established or maintained by an employer or by an employee organization." 29 U.S.C. §§ 1002(1), (2), 1003(a). Thus, although severance pay may be among the benefits provided by an ERISA-covered plan, this does not mean that all state laws relating to severance pay are automatically preempted. Instead, ERISA only preempts state laws that relate to private employee benefit plans, and it does not preempt such state laws in their entirety but only "insofar as" those laws actually relate to ERISA-covered plans. 29 U.S.C. § 1144(a).

[4] "Employee welfare benefit plans" are those which provide employee fringe benefits other than pension or retirement benefits. 29 U.S.C. § 1002(1).

The legislative history demonstrates that the preemption section was intended to eliminate "the threat of conflicting a inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29197, 29933 (1974) (statements of Rep. Dent and Sen. Williams). Toward this end Congress decided to preempt even state laws that were consistent with ERISA, thus effecting "the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29942 (1974) (statement of Sen. Javits). *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 99-100 and n.20.

In this case, Fort Halifax did not maintain any employee welfare benefit plan of any kind. The only private employee benefit plans established or maintained by Fort Halifax were its pension plans, and those plans were not altered or affected in any way by the Maine severance pay law. As a result, the Maine severance pay law does not relate to any private employee benefit plan and does not invade the area of exclusive federal regulation under ERISA.

Indeed, Fort Halifax does not argue in this case that the Maine severance pay law relates to its existing pension plans. Instead, it premises its preemption claim upon the theory that the severance pay law itself creates an ERISA-covered employee benefit plan by requiring employers to pay severance pay under certain circumstances. *See* Jurisdictional Statement at 7-8.[5] For numerous reasons, this argument cannot withstand scrutiny.

First, it completely ignores ERISA's focus on privately administered employee benefit plans. The Maine severance pay law is not a private employee benefit plan established by an employer or union; it is an independent statutory obligation established by the State. This point is crucial because the primary purpose of ERISA was to prevent abuses in privately-administered plans. ***E.g., Massachusetts Mutual Life Ins. Co. v. Russell***, 105 S.Ct. at 3090 n.8 ("the crucible of congressional concern was misuse and mismanagement of plan assets"); ***Donovan v. Dillingham***, 688 F.2d at 1370 ("Congress enacted ERISA to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans"). No such potential for abuse exists with respect to a statutory obligation enforced by a state agency.

Second, the Maine severance pay law lacks another essential element of an ERISA plan in that it does not create an ongoing program of benefits but instead imposes a one-time obligation in the event of a plant shutdown.

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[5] Ft. Halifax argues that the severance pay law gives employers the option of either accepting the statutory terms or selecting other terms. *(Id.)*. This ignores that employers can also contract with their employees to eliminate severance pay entirely.

While Congress did not define what it meant by a "plan, fund, or program" within the meaning of 29 U.S.C. §§ 1002(1) and (2), the overall structure of the ERISA statute demonstrates that there must at least be an ongoing program of benefits in order for the reporting, disclosure, and fiduciary requirements of ERISA to apply. Thus, a one-time payment of benefits is not sufficient to constitute an ERISA plan. *Martori Bros. Distributors v. Jones-Massengale*, 781 F.2d 1349, 1358 (9th Cir. 1986), *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986). ("It is difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan"). *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). Accordingly, the Maine severance pay law does not qualify as an ERISA plan because it is a one-time statutory assessment that applies only in the event of a plant closing; it does not require employers to provide severance pay at any other time, and it does not create an ongoing benefit program.

In addition, the theory advanced by Fort Halifax would lead to highly anomalous and illogical results. If (as Fort Halifax suggests) the severance pay law must be deemed to require employers to maintain an ERISA-covered plan, then it would be preempted even with respect to those employers who have no pension plan or employee benefit plan of any kind. Thus, the logical result of Fort Halifax's argument is that an employer which has no ERISA plan and which is therefore not subject in any way to regulation under ERISA would nevertheless be able to take advantage of ERISA preemption to escape its obligations under the Maine severance pay law. This makes no sense. *See Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195,

198 (1st Cir. 1986) (Aldrich, J., concurring).[6] The correct view, as the Ninth Circuit stated in *California Hospital Assn. v. Henning,* 770 F.2d 856, 861 (9th Cir. 1985), *amended on other grounds,* 783 F.2d 946 (9th Cir. 1986), *cert. denied,* 106 S.Ct. 3273 (1986), is that "federal exclusivity [under ERISA] is a corollary of regulatory coverage, not an independent statutory goal."

As part of its argument that this appeal merits plenary consideration, Fort Halifax suggests that the decision below cannot be reconciled with *Stanadrd Oil Co. v. Agsalud,* 442 F.Supp. 695 (N.D. Cal. 1977), *aff'd,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981). However, the *Agsalud* case is distinguishable on two fundamental grounds. First, the Hawaii statute at issue in *Agsalud* required employers to establish a comprehensive health care plan; this plainly constituted an ongoing benefit program subject to ERISA. In contrast, as noted above, the Maine severance pay law merely imposes a one-time payment in the event of a plant closing; this does not require employers to establish or maintain a "plan, fund, or program" within the meaning of 29 U.S.C. § 1002(1) and (2). *See Martori Bros. Distributors v. James-Massengale,* 781 F.2d at 1358. Second, the Hawaii statute in *Agsalud* also plainly related to an ERISA-covered plan in that it imposed certain specific additional requirements on the employer's existing ERISA plan. *See* 442 F.Supp. at 696. In the case at bar, however, the Maine severance pay law does not in any way alter or affect the rights or obligations of Fort Halifax under its existing pension plan. As a result, it does not invade the area regulated by ERISA and is not preempted.[7]

[6] Like this case, *Marcal* involved an employer's challenge to the Maine severance pay law based on ERISA preemption. Marcal, which had no employee benefit plan of any kind, adopted the argument pursued by Fort Halifax on this appeal: *i.e.,* that the Maine law was preempted even though it did not relate to any existing ERISA plan because the law itself constituted an ERISA-covered plan. In the First Circuit, two judges held that the case had properly been dismissed under the doctrine of abstention. Judge Aldrich disagreed with his colleagues that abstention was appropriate but nevertheless concurred in the result, stating: "I see no merit whatever in appellant's contention that ERISA preempts even when an employer has no plan." He went on to state that since Marcal was not subject to ERISA, it could not use ERISA to avoid the severance pay law: ["A]ppellant cannot have it both ways: no ERISA, and no State statute." 790 F.2d at 198.

Fort Halifax also suggests that the decision below is in "direct conflict" with *Metropolitan Life Insurance Co. v. Massachusetts,* 105 S.Ct. 2380 (1985); *Gilbert v. Burlington Industries, Inc.,* 765 F.2d 320 (2d Cir. 1985), *aff'd mem.,* 106 S.Ct. 3267 (1986); and *Holland v. Burlington Industries, Inc.,* 772 F.2d 1140 (4th Cir. 1985), *aff'd mem.,* 106 S.Ct. 3267 (1986). See Jurisdictional Statement at 14. No such conflict exists. *Metropolitan Life* involved a state statute which required ERISA-covered plans to provide certain specific benefits. The Maine severance pay law, however, does not require an employer who has established an ERISA-covered plan to include any provision in that plan for severance pay. Similarly, *Gilbert* and *Holland* both involved employers with established severance pay

[7] The issue of whether the severance pay law would be preempted where an employer has an existing ERISA-covered severance pay plan is not presented by this case. As the Maine Supreme Judicial Court pointed out, however, the Maine severance pay law is not applicable when there is an express contractual arrangement on the subject of severance pay, 26 M.R.S.A. § 625-B(3)(B), and this largely eliminates any possibility of overlap between ERISA and the severance pay law.

policies that were found to constitute private ERISA-covered plans. Under those circumstances, the employees' state law claims were premepted because they related to an ERISA-covered plan, and the employees were relegated to their remedies under ERISA. In the instant case, however, the employees' claims under the Maine severance pay law do not relate to any private ERISA-covered plan. In addition, the employees in this case cannot be relegated to their remedies under ERISA because no ERISA remedies are available. Accordingly, ERISA preemption is inapplicable.[8]

In sum, contrary to the argument made by Fort Halifax, "the preemptive scope of ERISA is neither all-encompassing . . . nor unlimited." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 2702 (1985) (citations omitted). The Maine Supreme Judicial Court

[8] Although this issue was not reached by the Maine Supreme Judicial Court, we submit that even if the Maine severance pay law were somehow found to relate to a private employee benefit plan covered by ERISA, it would nevertheless escape preemption pursuant to 29 U.S.C. § 1003(b)(3). That section provides that ERISA does not cover employee benefit plans maintained solely for the purpose of complying with applicable unemployment compensation laws. The legislative history of the severance pay statute establishes that it is a form of unemployment compensation law. *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d at 255 ("while the most common form of unemployment relief—the payment of benefits—follows the onset of the condition, not all legislative attempts to deal with these problems must take effect after the fact"). And while the severance pay law is not a traditional form of unemployment compensation law, this would not disqualify it from the exception to ERISA preemption under § 1003(b)(3). *See Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. at 2390 (neither ERISA statute nor its legislative history draw any distinction between "traditional" and innovative insurance laws for purposes of the insurance exception to ERISA preemption).

correctly rejected Fort Halifax's ERISA preemption claim, and this result is not in conflict with the prior decisions of this Court or of the various federal circuits.

2. NLRA Preemption

Fort Halifax also contends that the Maine severance pay law impermissibly interferes with the free play of collective bargaining and is therefore preempted by the NLRA.[9]

However, this claim is foreclosed by the decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2393-99 (1985), which rejected a virtually identical argument and ruled that the NLRA does not preempt a state from imposing substantive terms on parties to labor agreements. Indeed, almost the entire portion of Fort Halifax's jurisdictional statement that concerns NLRA preemption is devoted to a vain attempt to distinguish the *Metropolitan Life* case.

Like the Massachusetts statute at issue in *Metropolitan Life*, the Maine severance pay law is not addressed to the collective bargaining process. It merely requires that in-

[9] This argument seeks to take advantage of the NLRA preemption doctrine derived from such cases as *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976). A second form of NLRA preemption is derived from another line of cases beginning with *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The *Garmon* preemption doctrine is designed to protect the primary jurisdiction of the National Labor Relations Board. While the *Garmon* doctrine was raised below, Fort Halifax does not claim on this appeal that Maine is trying to regulate conduct that is within the jurisdiction of the National Labor Relations Board. In any event, such a claim would be untenable. *See, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Sears, Roebuck and Co. v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978).

dividual workers be given a specific benefit under certain circumstances. As a result, it fails within the category of state legislation establishing "minimum labor standards" as that term is used in *Metropolitan Life*. *See* 105 S.Ct. at 2397. While Fort Halifax contends that the severance pay law strengthens the hand of the union during collective bargaining, the same can be said for any minimum labor standard that guarantees employees a benefit that they no longer need to seek at the bargaining table. Nevertheless, such minimum labor standards were upheld in *Metropolitan Life*. NLRA preemption only applies when a state law impermissibly regulates the economic self-help remedies available to combatants in a labor dispute. *See Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. at 2394-95; *Belknap, Inc. v. Hale*, 463 U.S. at 499. Since the Maine severance pay law does not regulate or interfere with any of the economic weapons which Congress left to employers and employees, it is not preempted. *Compare Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. at 146-47.[10]

In fact, the Maine severance pay law is significantly less intrusive than the Massachusetts mandatory benefit law upheld in *Metropolitan Life* because it preserves the

[10] Fort Halifax also attempts to derive support from NLRA § 8(d), 29 U.S.C. § 158(d) (Jurisdictional Statement at 10). However, that section merely provides that an employer is not obliged to agree to any particular contract term during the collective bargaining process. Neither that section—nor the corollary principle that the NLRB cannot require an employer to accept a specific contract term as a remedy for a § 8(d) violation, *see H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)—prevents a state from regulating issues subject to collective bargaining by imposing substantive terms on the employment relationship. *See Metropolitan Life*, 105 S.Ct. at 2394, 2397, 2398-99; *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978).

freedom of employers and employees to contract on the subject of severance pay. *See* 26 M.R.S.A. § 625-B(3)(B). Since the law thus defers to any severance pay contract reached between the parties, it does not "prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." *Teamsters v. Oliver*, 358 U.S. 283, 295 (1959). *See* ***Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania***, 461 Pa. 68, 334 A.2d 636, 640 (Pa. 1975), *appeal dismissed for want of a substantial federal question*, 423 U.S. 806 (1975).

The second basis on which Fort Halifax attempts to distinguish *Metropolitan Life* is its claim that the Maine severance pay law does not affect union and non-union employees equally. Jurisdictional Statement at 12. This is flatly incorrect. The severance pay law draws absolutely no distinction between union and non-union employees. As demonstrated by the instant case, where at least 10 non-union supervisors were awarded severance pay in the Superior Court judgment,[11] the severance pay requires that both union and non-union employees receive severance pay in the event of a major plant closing.

Fort Halifax apparently premises its claim that the law does not treat union and non-union workers alike on the "express contract" exception contained in 26 M.R.S.A. § 625-B(3)(B). It argues that employers with non-union workers can "easily" avoid their obligations under the severance pay law (by requiring their employees to contract

[11] These ten are the "administrative employees" referred to in the Superior Court's May 2, 1985 decision at A25.

on this issue) and that the law therefore discriminates against unionized employers.[12] The short answer to this claim is that a state law which is even-handed on its face does not become "discriminatory" because it can more easily be avoided in some circumstances than others. And to the extent that Fort Halifax's argument is premised on the truism that non-union employees generally have less bargaining power than union employees, this situation is not peculiar to the Maine severance pay law but applies to all employment-related issues.

Finally, notwithstanding Fort Halifax's argument to the contrary (Jurisdictional Statement at 13), the Maine severance pay law must be found to be a valid exercise of the police power, under which states "possess broad authority . . . to regulate the employment relationship to protect workers within the state." *Metropolitan Life,* 105 S.Ct. at 2398, quoting *DeCanas v. Bica,* 424 U.S. 351, 356 (1976). *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.,* 320 A.2d at 254-55.

Thus, all of Fort Halifax's purported distinctions between this case and the principles laid down in *Metropolitan Life* are untenable. In addition, if Fort Halifax's argument were accepted, it would mean that the NLRA forecloses virtually all state regulation of collective bargaining issues. This is squarely contrary to the prior decisions of this Court establishing that the NLRA does not preempt "all state regulatory power with respect to those issues . . .

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[12] If, as Fort Halifax claims, it is so easy for employers to avoid the severance pay law with respect to non-union employees, one wonders why Fort Halifax did not do so with respect to its own non-union employees.

that may be the subject of collective bargaining." *E.g., Malone v. White Motor Co.,* 435 U.S. at 504-05. *See Motor Coach Employees v. Lockridge,* 403 U.S. 274, 289 (1971).

CONCLUSION

This appeal does not merit plenary consideration and should be dismissed for want of a substantial federal question.

Respectfully submitted,

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
(Counsel of Record)
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
207-289-3661

Attorneys for Appellee
P. Daniel Coyne, Director,
Bureau of Labor Standards,
Maine Department of Labor

Dated: Augusta, Maine
October 15, 1986

No. 86-341 (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

—*against*—

MARVIN W. EWING, Director Bureau of Labor Standards, Department of Labor,
Appellee,

—and—

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

—*against*—

RAYMOND BOURGOIN, et al.,
Appellees.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

RICHARD G. MOON
(*Counsel of Record*)
LINDA D. MCGILL
JOHN H. RICH III
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza
P.O. Box 426
Portland, Maine 04112
(207) 774-2635
Counsel for Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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Questions Presented

1. Whether the Maine Severance Pay Law, which requires certain employers either to enter into an express agreement for severance pay with certain employees or, in the absence of such an agreement, to pay the state mandated amount of severance pay, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*

2. Whether the Maine Severance Pay Law is preempted by the National Labor Relations Act, 29 U.S.C. §141 *et seq.*

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Statement of Interest

The Chamber of Commerce of the United States of America (Chamber) is a federation consisting of approximately 180,000 companies and several thousand state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, Congress and federal agencies. Accord-

ingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation.[1] Consents to the Chamber's *amicus curiae* participation in this appeal have been obtained from Appellant and Appellee and were filed with this Brief on October 16, 1986. The Chamber submits this Brief in support of the Appellant Fort Halifax Packing Company, Inc.'s Jurisdictional Statement.

This case involves the State of Maine's requirement that employers with 100 or more employees in one location during a specified twelve-month period enter into express agreements with certain of their employees to pay severance pay to such employees or pay the state mandated amount of severance pay upon a substantial cessation of the employer's business. The issues are whether Maine's law mandating severance pay (the Maine Severance Pay Law or Severance Pay Law) is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) regulating employee benefit plans and whether the state law impermissibly interferes with the federal labor scheme and protected rights declared in the National Labor Relations Act (NLRA).

These issues are of vital concern to the Chamber's members. Many members have plants in Maine and are directly affected by the Severance Pay Law. Moreover, the potential impact of the Severance Pay Law extends beyond Maine's borders. Under the rationale used by the Maine Supreme Judicial Court in upholding the Severance Pay Law, each state could create its own scheme for what ERISA-covered benefits must be

[1]*E.g., Wisconsin Department of Labor and Industry* v. *Gould,* 106 S.Ct. 1057 (1986); *Pattern Makers League of North America* v. *NLRB,* 105 S.Ct. 3064 (1985); *Allis Chalmers Corp.* v. *Lueck,* 105 S.Ct. 1904 (1985); *Trans World Airlines* v. *Thurston,* 469 U.S. 111 (1985); *New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519 (1979); *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976); *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975).

provided by employers. The uniform treatment of ERISA-covered benefits and the adequacy of funding for these benefits, cornerstone of ERISA, would be eroded. The principle of free collective bargaining under the NLRA would also be undermined, since no employer would be free to bargain to provide zero severance pay or to implement after impasse and without express contract a proposal for no or less severance than the state-mandated amount. Additionally, the Maine Supreme Judicial Court's decision upholding the Severance Pay Law is in direct conflict with recent decisions of this Court establishing the boundaries of the preemptive scope of ERISA and the NLRA.

REASONS FOR SUPPORTING PLENARY REVIEW

Summary of Argument

A substantial body of decisions of this Court delineates the boundaries of ERISA and NLRA preemption. This Court has held that ERISA expressly preempts all laws relating to any employee benefit plan. *Alessi* v. *Raybestos Manhattan, Inc.,* 451 U.S. 504 (1981). The preemptive effect of the NLRA is rooted in the Commerce Clause of the United States Constitution. *General Electric Co.* v. *Callahan,* 294 F.2d 60, 66 (1st Cir. 1961), *cert. dismissed,* 369 U.S. 832 (1962). Both ERISA and the NLRA apply to the vast majority of employers in this country.

By enacting ERISA, Congress sought to create uniformity in benefits laws and to prevent inconsistent or conflicting state regulation of employee benefit plans. *See Shaw* v. *Delta Airlines, Inc.,* 463 U.S. 85, 98-99 (1983); *Holland* v. *Burlington Industries,* 772 F.2d 1140, 1147 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.,* 106 S.Ct. 3267 (1986). Similarly, by establishing the framework for collective

bargaining and declaring certain labor-management conduct prohibited or protected or free from regulation under the NLRA, Congress created a federally supervised arena in which employees could peacefully use their economic strength to fashion their working relationship. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

In determining whether the express language and well established purposes of ERISA and the NLRA which have contributed to the United States' industrial prosperity and employee security, preempt the Maine Severance Pay Law, consideration must be given to the constitutionally recognized police power of each state to institute legislation to protect the health and welfare of its citizens. *DeCanas* v. *Bica*, 424 U.S. 351 (1976). Measuring, however, the extent of ERISA preemption against the police power interest of Maine in regulating the employee benefits area, it is clear that the Maine Severance Pay Law must be invalidated. The Law impermissibly affects an ERISA-covered benefit, damages ERISA's central purpose of uniformity, and is not the only means by which Maine can address the economic impact of a plant shutdown. Moreover, the Maine Severance Pay Law impermissibly tips the balance of economic power struck by the NLRA between an employer and an employee, and prevents an employer from exercising the NLRA protected right to refuse to agree to any benefit and to institute unilaterally its last best offer after a bargaining impasse is reached.

While such major disruption to federal policy is alone sufficient to warrant preemption, the Maine Severance Pay Law is equally in conflict with this Court's tolerance for minor intrusions by states into federally regulated labor matters. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. 2380 (1985). The Maine Severance Pay Law is neither a uniform law nor a minimum standards law and it intrudes directly

and substantially into matters controlled by ERISA and the NLRA. By applying only to employers of 100 or more employees in a single facility the Maine Severance Pay Law discriminates against large multistate employers, particularly those with large facilities. Similarly, the Severance Pay Law also appears to treat unionized and non-unionized companies differently by requiring bargaining only for unionized employees. The Severance Pay Law also vitiates the notion of a minimum standards law by permitting employers and employees to agree to a lower benefit level than the law requires absent an agreement. The State of Maine's reasonable goal of reducing the possible economic hardship to a distinct group of employees or communities cannot be fulfilled in a manner which so directly conflicts with the language and Congressional intent of our nation's most important employment statutes and with the decisions of this Court.

Finally, this Court's recent decision in *Metropolitan Life Insurance Co.* v. *Massachusetts* is being construed by parties such as the Appellee as authority for substantial incursions into employment issues traditionally covered by the NLRA's "free play" of economic forces doctrine. While the Chamber believes *Metropolitan* reaffirmed this Court's commitment to free collective bargaining, unimpeded by statutes which affect the economic power of either party, *Metropolitan's* discussion of the "interstitial" nature of federal labor law suggests the possibility of a much larger role for state statutory action than previously has been recognized. Clearer guidance in the form of an express reaffirmation of the "free play doctrine" will prevent a state statutory assault on collective bargaining and NLRA protected rights, and avoid hundreds of lawsuits by employers, unions and state governments to determine the legality of such statutes.

ARGUMENT

I. The Decision Of The Maine Supreme Judicial Court Should Be Reversed Because It Is In Conflict With The Holdings Of This Court And Several Lower Federal Courts On The Scope Of ERISA And NLRA Preemption.

A. ERISA Preemption.

1. By Requiring An Express Agreement Providing For Severance Pay, The Maine Severance Pay Law Impermissibly Affects ERISA-Covered Plans.

While the Maine Supreme Judicial Court acknowledged this Court's holding in *Shaw* v. *Delta Airlines*, 463 U.S. at 98, that ERISA preempts state actions that have "a connection with or reference to" employee benefit plans (Appendix p. A 7), the State Court concluded that the Maine Severance Pay Law did not have the requisite connection or reference. That conclusion is in direct conflict with this Court's decisions in *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S.Ct. 3267 (1986) and *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986). In affirming the Fourth and the Second Circuit Courts of Appeals, this Court made clear that severance pay plans or programs need not be created by "express ageements" to be within the scope of ERISA-covered benefit plans.

In both *Holland* and *Gilbert*, the severance pay provision of Burlington Industries was set forth only in its Policy Manual and its Salaried Employee Handbook. The Burlington program provided for disqualification for narrow reasons, the determination of which was left to the company's discretion as long as it did not act arbitrarily or capriciously. Crucially, in each case the Circuit Court recognized that a unilateral statement

of intent to pay severance pay, with no trustee, trust fund or filing with the Department of Labor constitutes an ERISA-covered plan. *Holland*, 772 F.2d at 1144-1145; *Gilbert*, 765 F.2d at 324-326. Indeed, both Circuits made clear that "ERISA governs employer severance pay plans whether funded from general assets, as here, or from a special trust." *Holland* at 1144; *Gilbert* at 325-236.[3] This Court's affirmance of *Holland* and *Gilbert* makes their holdings the law of the land. *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

Gilbert and *Holland* effectuate Congress' intent that ERISA preemption sweep broadly. In expressly rejecting a narrower preemption provision that would have accommodated some state action in the employee benefits area, Congress recognized the concern of multistate employers that employee benefit laws and regulations be uniform. *Shaw*, 463 U.S. at 105. Accordingly, ERISA defines covered employee benefit plans expansively: "[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or any employee organization, or by both . . ." 29 U.S.C. 1002(1). Thus, as *Gilbert* and *Holland* hold, ERISA covers informal plans or programs, whether or not they are the "express agreements" required to obviate the operation of the Maine Severance Pay Law.

Since the Maine Severance Pay Law exempts from its requirements only those severance pay arrangements which are created by an express agreement, Burlington's ERISA-covered

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[3] *See also Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc) (holding that a plan exists under ERISA "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits"). *Accord Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-04 (9th Cir. 1985); *Molyneux* v. *Arthur Guinness & Sons*, 616 F. Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1267 (N.D. Ala. 1983).

plan would not be recognized by Maine's law. Under the Maine Supreme Judicial Court's decision, Burlington would be required to comply with the Severance Pay Law.

As the Burlington example illustrates, the effect of the Maine Severance Pay Law is to invalidate or supplement a plan which is within the scope of ERISA. In short, no law can have a more direct "reference or connection" with an ERISA-covered benefit plan than the Maine Severance Pay Law. The Maine Supreme Judicial Court's conclusion to the contrary is in direct conflict with this Court's decision. Indeed, at footnote 9 of its opinion the Maine Supreme Judicial Court implicitly acknowledges the conflict, underscoring the need for this Court to state that the Maine Severance Pay Law does relate to ERISA benefit plans and is preempted. (Appendix, p. A 9, n. 9.)

2. The Maine Severance Pay Law Requires Private Employers To Have A Severance Plan In Violation Of ERISA.

As Appellant has pointed out in the Jurisdictional Statement, *Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), establishes that a state may not mandate creation of a welfare benefit plan. While the Maine Severance Pay Law is different in substance from the Hawaii prepaid health care law at issue in *Agsalud*, it is alike in one crucial respect. Its effect is to force an employer to pay certain ERISA-covered benefits. Under *Agsalud*, the Maine Severance Pay Law must be invalidated. *See also Stone & Webster Engineering Corp* v. *Isley*, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi* v. *Stone & Webster Engineering*, 463 U.S. 1220 (1983). Moreover, as this Court has observed, ERISA does not mandate that employers provide any particular benefit. *Shaw* v. *Delta Airlines*, 463 U.S. at 91. See also *Sutton* v. *Weirton Steel Div. of National Steel Corp.*, 567 F. Supp. 1184, 1195 (N.D.W.Va. 1983), *aff'd*, 724 F.

2d 406, *cert. denied*, 467 U.S. 1205 (1984). ERISA contains only expressly stated exemptions and exclusions (29 U.S.C. §1144(b)(2)(A) and (b)(4)) from its preemptive reach, and a state's right to require the existence of a benefit plan is not among them. Given ERISA's preemptive sweep and under general rules of statutory construction, a state therefore cannot mandate that employers pay specific benefits, even without the dispositive holding of *Agsalud*.

B. NLRA Preemption.

1. The Maine Severance Pay Law Is Neither A Uniform Law Nor A Minimum Standards Law, But Rather Impermissibly Creates A Bargaining Chip For A Distinct Group Of Employees.

Over several decades there have evolved through this Court's decisions several basic principles governing industrial relations under the NLRA. Included in those principles are the so-called "free play doctrine", *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964), the jurisdictional authority of the NLRB, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and the right for either labor or management to refuse or to be free from imposition of any particular contract provisions, *H.K. Porter Company, Inc.* v. *NLRB*, 397 U.S. 99 (1970). Certain exceptions, limitations or clarifications to some of those general principles have been recognized by this Court, such as: the authority of the states to regulate unemployment compensation benefits, *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); a state's right to enforce common law tort actions for fraud, *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983); and a state's right to regulate the content of insurance policies that are to be sold in that state. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. 2380 (1985).

In defining the boundaries of NLRA preemption, this Court has never permitted states to regulate directly the economic

balance of power between employers and employees in the absence of Congressional intent to tolerate such regulation. *See Golden State Transit Corp.* v. *Los Angeles*, 106 S.Ct. 1395, 1401 (1986); *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. at 2395; *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. at 531 and at 554 in Justice Powell's dissent; *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. at 141, 149; *Local 24 of the International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959); *Teamsters Local 20* v. *Morton*, 377 U.S. at 260. The Maine Severance Pay Law unquestionably regulates the economic balance. By requiring Maine employers with more than 100 employees in one location during the twelve months prior to a shutdown or substantial cessation of business either to contract expressly for severance pay or to pay the state mandated amount, the Severance Pay Law limits severely the solutions that those employers are free to reach in bargaining over wages and working conditions. Moreover, there is no evidence to suggest that Congress intended to tolerate this type of direct interference. *Cf. Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. 2380.

In *Metropolitan*, a state law requiring inclusion of mental health care benefits in health insurance policies was upheld even though it affected a mandatory subject of bargaining. This Court sustained the Massachusetts law because it: (1) is a minimum labor standards law of the kind which Congress has traditionally recognized as outside the scope of the NLRA; (2) does not discourage or encourage the bargaining process; and (3) is uniform in its application. In contrast, the Maine Severance Pay Law meets none of these criteria.

First, for the reasons set out in Appellant's Jurisdictional Statement, p. 12, the Severance Pay Law is not a minimum labor standards law. Neither is it neutral toward the bargaining process. Under the Severance Pay Law, an employer is not free to refuse to agree to severance pay or to implement unilaterally after impasse a last offer for zero severance or less severance than the state-mandated amount. As a result, a union can use the Severance Pay Law as a bargaining chip to require concessions from an employer in exchange for the union's agreement to less than the state-mandated severance amount. Alternatively, a union can refuse to bargain over severance pay with no pragmatic consequences, since employees will receive severance anyway under the Severance Pay Law. If a state may lawfully create this Hobson's choice for an employer on severance pay, it may do the same with every other benefit, in effect removing from bargaining altogether what under the NLRA are mandatory subjects. The result is to chip away the NLRA's cornerstone of free collective bargaining, with the state rather than the parties striking the balance on mandatory subjects.

Third, the Maine Severance Pay Law is not one of uniform application. By mandating that employers with 100 or more employees in one location must agree on some amount of severance pay, Maine has carved out a small portion of the employer-employee universe. In addition to treating employers differently depending on their size, the Severance Pay Law treats unionized and non-unionized employers differently. By excluding express agreements between employers and employees from its coverage the Severance Pay Law appears to permit a non-unionized employer to declare unilaterally the level of severance pay, creating an express agreement. Yet a unionized employer must accept either its union's demands or pay the state's amount. The Maine Severance Pay Law is thus in direct conflict with the decision in *Metropolitan*, that for any law to permissibly intrude into the bargaining sphere it must apply equally to union and non-union employees and employers.

To the extent that this Court's discussion in *Metropolitan* even arguably opens the door to state regulation of mandatory subjects of bargaining by enactment of uniform minimum standards laws, that discussion should be further clarified. While

the Chamber recognizes the probable impossibility of establishing a rule that eliminates all uncertainty as to what is or is not preempted by the NLRA, this Court should make clear that the establishment by a state of a complete labor code under the minimum standards approach is preempted. Reaffirmation of the "free play doctrine" in the factual context of this case will provide employees, unions and state legislatures with clearer guidance as to what is permissible state action in the collective bargaining arena. Holding the Maine Severance Pay Law preempted will provide both that reaffirmation and consequent guidance.

2. The Maine Severance Pay Law Precludes The Employer's Protected Right To Bargain To Impasse And Institute Its Last Best Offer.

a. The Maine Severance Pay Law Interferes With An Employer's Right To Refuse To Agree To Severance Pay And To Stand On Its Refusal.

The second NLRA preemption principle articulated by this Court is the so-called *Garmon* preemption, which prohibits states from regulating activity that the NLRA protects, prohibits or arguably protects or prohibits. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

There are no circumstances under the NLRA which would compel Fort Halifax to pay severance to its employees, in the absence of its voluntary agreement to do so. Under Section 8(d) of the NLRA, both labor and management are protected absolutely from forced agreement on any subject:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*

29 U.S.C. 158(d) (emphasis added).

The conflict between the NLRA and the Maine Severance Pay Law is crystalline. Under Section 8(d) of the NLRA, an employer may absolutely refuse to agree to any amount of severance pay. Even the NLRB, with its broad remedial authority, may not compel the employer to agree to pay severance. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In contrast, under the Maine Severance Pay Law, refusal to agree to severance is not only unprotected but penalized.[3] As this Court has recently reaffirmed, a state may not create a remedy that Congress has withheld from the National Labor Relations Board. *Wisconsin Dept. of Industry* v. *Gould, Inc.*, 106 S.Ct. at 1061.

b. The Maine Severance Pay Law Interferes With The Employer's Protected Right To Implement Its Last Best Offer.

Under the NLRA, one economic weapon available to the employer is the unilateral implementation of its last best offer in the face of *bona fide* impasse. Unilateral implementation is protected under the NLRA as much as a strike, lock-out or other economic activity. *Reed & Prince Mfg. Co.* v. *NLRB*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

Applying the use of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement a no severance pay policy. The policy would be binding on employees and their representative. Under the proper circumstances (that is, assuming no order by the NLRB to bargain further), it would be the last word on severance pay.

Yet a covered Maine employer who bargains to impasse and implements its last offer of zero or some severance pay without

[3]In enforcement proceedings under the Maine Severance Pay Law, an employer would be liable for both the statutory amount of severance and attorney's fees and costs. 26 M.R.S.A. §625-B (6-A).

an express agreement will nevertheless be compelled to pay severance according to the statutory formula. The effect of the Severance Pay Law is to deprive the employer of its legitimate and powerful economic weapon of unilateral implementation, even though this weapon is sanctioned and protected by the NLRA and is an integral part of the scheme of federal labor law.

II. The Maine Supreme Judicial Court's Reliance On The Police Power Of The State Does Not Save The Maine Severance Pay Law From Preemption.

The Maine Supreme Judicial Court's reliance on the police power of the state is not controlling on either ERISA or NLRA preemption. In order to avoid ERISA preemption, a state law, in addition to being an exercise of traditional police power, must also affect an ERISA-covered plan "in too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan." *Gilbert*, 765 F.2d at 327, quoting *Shaw*, 463 U.S. at 100 n. 21. The Chamber respectfully submits that a statute which invalidates ERISA-covered welfare benefit plans such as Burlington's, requires the creation of an ERISA-covered plan, or is itself such a plan, hardly has a "tenuous, remote or peripheral connection" to an ERISA-covered plan.

The Maine Severance Pay Law also relates to ERISA-covered plans because it gives to the state the power to enforce the statute, thereby ensuring that the State of Maine and its courts will be embroiled in deciding whether or not an informal plan, such as Burlington's, is exempt from the Severance Pay Law as an express agreement and if so, who is covered by the exempt plan.[4] It is impossible to see how that circumstance,

[4]Footnote No. 9 of the Maine Supreme Judicial Court's opinion in this case (Appendix at p. A 9), is an express admission that in some

(Footnote continued on following page)

clearly real and not just speculative, does not "relate to" an ERISA-covered plan.

III. As A Matter Of National Industrial And Employment Relations Policy The Maine Severance Pay Law Should Be Held Preempted By ERISA And The NLRA.

In enacting ERISA Congress chose the path of uniform treatment of employee benefit plans. As stated by Representative Dent, one of ERISA's sponsors, the "crowning achievement" of ERISA was "eliminating the threat of conflicting and inconsistent state and local regulations". 120 Cong. Rec. 29197 (1974). The trade-off for many companies for the subjection to stringent procedural rules and administrative safeguards, as well as the tremendous cost to United States industry for the required funding, was the ability to predict the costs and to plan under one set of rules. Although the Maine Severance Pay Law has the laudable social goal of reducing the economic dislocation to individuals and communities which may result from a major reduction in employment, the Severance Pay Law is in direct conflict with ERISA's purposes of uniformity and self-determination within ERISA's rules. Similarly, contrary to the historical goal of free collective bargaining, the Severance Pay Law changes dramatically the economic strength of the bargaining participants. While the Maine Severance Pay Law is presently the only state law that requires covered employers to pay severance, if allowed to stand the Severance Pay Law will

(Footnote continued from previous page)

cases Maine's courts would be called upon to decide whether a Burlington type plan is or is not an express agreement. Additionally, Maine's courts will on occasion be required by the Severance Pay Law to decide who is an employee entitled to severance pay, a decision which is within the exclusive jurisdiction of the NLRB if the question involves an unfair labor practice or, if the question is one of interpretation of a written collective bargaining agreement, is normally within the determination of an arbitrator, subject to limited judicial review.

be a blueprint for each state, and indeed any other entity such as a county or municipality, to create similar laws.[8]

The variations with which employers might be confronted are endless. From state legislatures alone there could be fifty or more different mandatory severance pay or pension plans. Each state could apply its laws to a different size employer, or even require different benefits based on the size of the company. One state could exempt any employer with an express agreement providing the benefit, as in Maine, while another could exempt any company with a unilaterally adopted plan. Some states might base their benefits coverage on gross sales, other states on gross wages paid by the company. The net effect would be to eliminate a multi-state employer's ability to plan its costs of operations or to base business decisions on the resources and markets available in certain localities. Such intrusions into national labor policy will lead to endless litigation in an effort to redetermine where federal preemption limits a state's authority. The cost of doing business, a burden that American

[8]While no other similar laws exist, several states have considered plant closing legislation. Three states in addition to Maine currently have plant closing legislation: Massachusetts, 1984 Mass. Pub. L. 608; South Carolina, S.C. Code Ann. § 41-1-40 (Law Co-op. 1986); and Wisconsin, Wis. Stat. Ann. § 109.07 (West Supp. 1985). Maryland has enacted a statute providing for the Governor's Employment and Training Council and the Maryland Department of Employment and Training to jointly develop guidelines for employers in the event of a plant closing or layoff affecting fifty or more employees (Senate Bill 182, Ch. 147 (1985)). Other states which considered some form of plant closing legislation during 1985 include Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Maine, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, Oregon, South Carolina, Vermont, Washington and West Virginia. New bills have been introduced in Indiana (Senate Bill 424) and Kentucky (House Bill No. 340), *Annual Report of the Subcommittee on Plant Closings of the American Bar Association's Labor and Employment Law Section Committee on Individual Rights and Responsibilities in the Workplace*, 2 The Labor Lawyer 3, pp. 356-357 (1986).

industry already frequently finds hard to carry and still compete with foreign corporations, would be greatly increased.

CONCLUSION

In sum, affirmance of the decision of the Maine Supreme Judicial Court would provide the authority and impetus for states to enter the benefits arena whenever an employer has failed to provide the sort of protection which a state legislature believes useful. Such intrusion is contrary to the Congressionally mandated labor policy embodied in ERISA and the NLRA. The issues and policy considerations presented by this case warrant plenary jurisdiction and *amicus* respectfully requests that the Court note probable jurisdiction of this case.

Respectfully submitted,

Richard G. Moon
Linda D. McGill
John H. Rich III

All of:

Perkins, Thompson, Hinckley & Keddy
One Canal Plaza, P.O. Box 426
Portland, Maine 04112
Telephone: (207) 774-2635
Counsel for Amicus Curiae

Of Counsel:

Stephen A. Bokat
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

(5)

No. 86-341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

MARVIN W. EWING, Director Bureau of Labor Standards, Department of Labor

Appellee

and

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

RAYMOND BOURGOIN, *et al.*

Appellees

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

JOHN C. YAVIS, JR.
(*Counsel of Record*)

THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone (203) 240-6000

Appellant's Attorneys

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In accordance with Rule 28.1 of the Rules of this Court, Fort Halifax Packing Company ("Fort Halifax") states that on September 29, 1986, Hudson Foods, Inc., a Delaware corporation with a Rogers, Arkansas headquarters, purchased all of the outstanding and issued stock of Fort Halifax's parent, Corbett Enterprises, Inc., a Delaware corporation.

Table of Authorities

ARGUMENT

1. Erisa Preempts the Maine Severance Pay Statute

There is no dispute here that severance pay is an "employee benefit" within ERISA's contemplation. Nor can it be questioned that the Maine severance pay statute requires certain employers to distribute this ERISA benefit according to a "plan": either by statutory formula or by a privately established substitute. These facts alone dictate the unassailable conclusion that ERISA preempts the Maine severance pay statute because it has "a connection with or reference to" employee benefit plans. *See Shaw* v. *Delta Air Lines Inc.*, 463 U.S. 85, 98 (1983).

This appeal presents a substantial question of federal law and merits plenary review because the Maine Supreme Judicial Court sought to interpose a heretofore unrecognized "safe harbor" from ERISA preemption for state-imposed ERISA benefits. Likewise, the State of Maine argues that the severance pay statute is saved from ERISA preemption because the statute itself "is not a private employee benefit plan established by an employer or union." Motion to Dismiss or Affirm at 8. This argument is premised upon the supposition that ERISA preempts only those plans whose terms have been voluntarily established by private parties. *Standard Oil Co. of California* v. *Agsalud*, 663 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), disposed of this faulty supposition.

The appellee's attempt to distinguish *Agsalud* by suggesing that there is no preemption where the state statute does not affect pre-existing employee benefit plans (see Motion to Dismiss or Affirm at 10-11) fails because the *Agsalud* holding is not limited to the imposition of additional requirements upon existing plans. In *Agsalud*, the Hawaii statute was preempted as to all employers, regardless of whether they had existing plans. Moreover, appellee's claim to the contrary cannot be reconciled with Congress's aim "to occupy fully the field of employee benefit plans." *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 326 (2d Cir. 1985), *aff'd mem.*, 54 U.S.L.W.

3836 (Sup. Ct. June 23, 1986). The State of Maine may no more impose severance pay upon employers without preexisting severance pay plans than it might mandate that employers without pension plans pay pension benefits. The states do not have the authority to regulate the distribution of ERISA benefits.

Even if there were a valid distinction between statutorily-imposed ERISA benefits and those provided by private contract, Maine's position would have no merit. Whether or not the Maine severance pay statute effectively requires employers to establish a severance pay plan as Fort Halifax contends, ERISA preempts the statute because it "relates to" employee benefit plans. The relationship between the state statute and employee benefit plans is an inverse, one-to-one relationship: an employer may only deviate from the statutory benefits if it establishes an employee benefit plan that includes a severance pay provision.[1] One could hardly posit a statute with a clearer "connection with or reference to" employee benefit plans.

This Court's holdings in *Gilbert* and *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 54 U.S.L.W. 3836 (Sup. Ct. June 23, 1986), belie the State of Maine's additional claim that the Maine statute does not relate to an employee benefit plan because the statute "imposes only a one-time obligation in the event of a plant shutdown." Motion to Dismiss or Affirm at 8-11. By their very nature severance pay plans typically involve one-time, lump sum payments; nevertheless, as *Gilbert* and *Holland* hold, they are ERISA plans. There is no requirement that

[1]The State of Maine suggests that the Maine statute does not impose upon employers the obligation to distribute severance benefits because "employers can also contract with their employees to eliminate severance pay entirely." Motion to Dismiss or Affirm at 8 n.5. This disingenuous interpretation does not comport with the statute's express language. See Appendix at A48, ¶3B. Moreover, even if this were a fair reading of the statute, it nevertheless would impose the establishment of an employee benefit plan—albeit one that may possibly confer a zero benefit.

a plan "create an on-going program of benefits" (*id.*) in order to fall within ERISA's scope, and *Martori Bros. Distributors* v. *Jones-Massengale*, 781 F.2d 1349 (9th Cir. 1986) does not hold otherwise. There, the court explicitly recognized that ERISA preempts state laws that regulate the *type* of benefits covered by ERISA (781 F.2d at 1357), but held that there was no regulation of an ERISA benefit involved in a state labor relations board's "make whole" remedy for an unfair labor practice. *Id.* at 1358. Here, in contrast, the Maine statute undeniably mandates payment of an ERISA benefit.

In sum, in enacting the comprehensive regulation of employee benefit plans, the United States Congress chose not to mandate the payment of benefits within ERISA's scope. The State of Maine cannot impose upon employers that which Congress left voluntary.

2. The NLRA Preempts the Maine Severance Pay Statute

The parties to this appeal agree that the proper interpretation of *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S. Ct. 2380 (1985), resolves the NLRA preemption issue in this case. Fort Halifax reads *Metropolitan* as an exceptional case in the long line of *Machinists* NLRA preemption cases, turning principally upon the following factors: i) the Massachusetts statute established a *minimum* standard; ii) the state imposed the standard upon insurers rather than directly upon employers; iii) employers could avoid the standard by declining to offer insurance coverage or by self insuring; and iv) the statute involved insurance, a traditional bastion of state regulation. The State of Maine, on the other hand, reads *Metropolitan* not as an exception but as the case that swallows the *Machinists* rule. This conflicting reading of *Metropolitan* alone suggests the need for plenary review.

Moreover, whatever the ultimate import of *Metropolitan* may be, it cannot be seriously contended that it "foreclose[s]" this

appeal. See Motion to Dismiss or Affirm at 13. The fundamental and critical distinction between this case and *Metropolitan* is that the Maine statute does not establish the requisite minimum standard that saved the Massachusetts statute. Even the appellee concedes that employers may contract to provide for less than the benefit provided in the statute. See Motion to Dismiss or Affirm at 8 n.5, 13-14. In the absence of a true minimum standard, *Metropolitan* cannot support the State of Maine's position.

Conclusion

For the foregoing reasons, and the reasons stated in the Jurisdictional Statement, we respectfully request that the Court note probable jurisdiction of this appeal.

JOHN C. YAVIS, JR.
THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE

All of:
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
(203) 240-6000
Attorneys for Appellant

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 86-341

In the Supreme Court of the United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC., APPELLANT

v.

P. DANIEL COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS, MAINE DEPARTMENT OF LABOR, ET AL.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

BETTE J. BRIGGS
Attorney

Department of Labor
Washington, D.C. 20210

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QUESTION PRESENTED

Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts a Maine statute which requires major employers to provide specified severance benefits unless an employee is covered by an express contract concerning severance pay.

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ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case involves interpretation of the coverage and preemption provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.* Congress enacted ERISA to promote the development of private pension and welfare plans, to assure uniform regulation of such plans, and to protect the interests of participants and beneficiaries in plan benefits. The Secretary of Labor enforces the reporting, disclosure, and fiduciary obligations that ERISA imposes on private employee benefit plans. Accordingly, he has a substantial interest in the determination of the types of plans that are covered by the federal statute

and therefore immune from state regulation under ERISA's preemption provision.

STATEMENT

A. Statutory Background

1. Congress enacted ERISA in 1974 "to promote the interests of employees and their beneficiaries in employee benefit plans" (*Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)) by requiring reporting and disclosure of information about plans, setting standards of conduct of plan fiduciaries, and providing appropriate legal remedies. 29 U.S.C. 1001(b). In addition to pension plans, the statute covers a wide range of "welfare" plans, defined as "any plan, fund or program * * * established or maintained by an employer" for the purpose of providing specified benefits, including medical, disability, death, unemployment, vacation, holiday, and severance benefits (29 U.S.C. 1002(1)). There is no question that plans providing severance benefits, the type of benefit at issue in this case, are welfare plans. *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1146 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986); *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 324-326 (2d Cir. 1985), aff'd mem., No. 85-441 (June 23, 1986).

ERISA imposes certain uniform standards on the design, administration, and operation of all employee benefit plans (see 29 U.S.C. (& Supp. II) 1102, 1103, 1021-1031), including standards of fiduciary conduct in the management of plans and their assets (29 U.S.C. (& Supp. II) 1104-1113. Nothing in ERISA either mandates employers to provide particular benefits or otherwise regulates the substantive content of plans.

Section 514(a) of ERISA provides that the federal statute "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. 1144(a). This broad preemption provision "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13. ERISA (and thus its preemption provision) does not cover certain enumerated types of plans, including those "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." Such plans therefore remain subject to state regulation. § 4(b)(3), 29 U.S.C. 1003(b)(3).[1]

2. The state law at issue here is a Maine statute, Me. Rev. Stat. Ann. tit. 26, § 625-B (Supp. 1986), requiring employers of 100 or more employees who close or relocate their establishments to pay to employees who worked for the employer for more than three years severance benefits at the rate of one week's pay for each year of employment.[2] The state law provides that there shall be no liability for severance pay to an eligible employee in several circumstances, including where "[t]he employee is covered by an

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[1] In addition, the statute explicitly exempts from preemption state laws that regulate insurance, banking, and securities (§ 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A)), and "any generally applicable criminal law of a State" (§ 514(b)(4), 29 U.S.C. 1144(b)(4)). These exemption provisions are not at issue in this case.

[2] The full text of the Maine law is set forth at J.S. App. A47-A50.

express contract providing for severance pay" (§ 625-B(3)(B)). The Director of the Maine Bureau of Labor Standards is authorized to supervise the payment of benefits due under the statute and to bring an action in state court to recover unpaid severance pay (§625-B(5)).

B. Proceedings Below

1. On May 23, 1981, appellant, Fort Halifax Packing Company, shut down its poultry processing plant at Winslow, Maine, and laid off virtually its entire work force (J.S. App. A2). Many of the laid-off employees were covered by a collective bargaining agreement between Fort Halifax and Local 385 of the Amalgamated Meat Cutters union (*id.* at A3). While the employees were eligible to participate in retirement plans,[3] at the time of the plant closing neither the collective bargaining agreement nor any other contract provided for severance pay (*ibid.*).

2. Following the plant closing, appellee, the Director of Maine's Bureau of Labor Standards, brought suit in the Superior Court for Kennebec County, Maine, seeking severance pay on behalf of all eligible Fort Halifax employees pursuant to Section 625-B (J.S. App. A30). Ruling on cross-motions for summary judgment, the trial court held Fort Halifax liable for severance pay under the state statute (*id.* at A42) and ordered payment of specified amounts to designated employees (*id.* at A21, A26-A29). The

[3] According to Fort Halifax (J.S. 3 & n.2), its employees were covered by retirement plans which entitled them to immediate vesting and distribution of plan assets upon the closing of the plant. Maine states (Mot. to Aff. 3 & n.2) that the employees were entitled to receive only their own contributions at the time the plant closed.

court rejected Fort Halifax's argument that ERISA preempts Maine's severance pay statute, concluding that "[t]he subject targeted in ERISA is the employer-employee relationship as expressed in private benefit plans, not state statutes enacted pursuant to the police power to alleviate the impact of job termination" (*id.* at A34).

The Maine Supreme Judicial Court affirmed. The court concluded that "our statute will be preempted only if it can be said to have 'a connection with or reference to' employee benefit plans that are within ERISA's coverage" (J.S. App. A7, quoting *Shaw*, 463 U.S. at 97-98). The court determined that there was no applicable employee benefit plan, reasoning that ERISA's definition and coverage provisions (29 U.S.C. 1002(1), 1003(a)), which refer to plans "established or maintained by an employer or by an employee organization, or by both," encompass only plans that are affirmatively created by the statutorily designated parties (J.S. App. A7-A8). The court instead concluded that the Maine statute merely provides a "state created fringe benefit" (*id.* at A8).[4] Moreover, the court interpreted Section 625-B's exception to liability for employees "covered by an express contract providing for severance pay" to mean that the state law applies "only when a privately created employee benefit plan covering severance pay is not in existence" (J.S. App. A8-A9). Accordingly, the court held that since the state law does not impli-

[4] The holding that the statute does not create employee benefit plans made it unnecessary for the court to reach the question whether any such plan would be exempted under Section 4(b)(3) of ERISA as a plan "maintained solely for the purpose of complying with applicable * * * unemployment compensation * * * law" (29 U.S.C. 1003(b)(3)).

cate an ERISA-covered plan, it is not preempted by ERISA (*ibid.*).[5]

SUMMARY OF ARGUMENT

ERISA's definitional and coverage provisions manifest Congress's intent to bring within the scope of exclusive federal regulation essentially all arrangements for the payment of fringe benefits except for several expressly exempted types of plans. Section 514(a), 29 U.S.C. 1144(a), provides that ERISA preempts "any and all State laws" that "relate to any employee benefit plan." This Court has held that ERISA's preemption provision "was intended to displace all state laws that fall within its sphere" (*Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13), rendering benefit plan regulation "exclusively a federal concern" (*Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-523 (1981)).

The Maine severance pay statute imposes on employers a compulsory fringe benefit program of a type covered by ERISA. It requires the creation of welfare plans by mandating the payment of severance benefits under specified circumstances and providing all the terms necessary to establish severance pay plans. Because the state law mandates the creation of employee benefit plans, and does not come within

[5] The court also concluded that the Maine severance pay statute is not preempted by the National Labor Relations Act (NLRA). The court relied primarily on this Court's decision in *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), where the Court held that there was no reason to believe that Congress, in enacting the NLRA, intended to preempt state laws "that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization" (slip op. 30).

ERISA's exceptions from preemption, it is preempted.

There is no merit to Maine's argument that the statute does not "relate to" an ERISA plan because it does not require employers to establish plans but instead merely requires employers to pay severance benefits. This Court has held that state laws which require "employers to pay employees specific benefits * * * clearly relate to benefit plans" (*Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)), and affirmed a Ninth Circuit decision holding that a Hawaii law mandating the payment of fringe benefits was preempted by ERISA (*Standard Oil Co.* v. *Agsalud*, 633 F.2d 760 (1980), aff'd mem., 454 U.S. 801 (1981)). Since the Maine statute itself sets out all the requisites of a severance pay plan and thus itself mandates the creation of such plans for covered employers, it "relates to" such plans.

The legislative history confirms that ERISA preempts state laws that mandate the payment of fringe benefits. The members of the Conference Committee that drafted ERISA's broad preemption provision understood that it broadly preempted state action in the field of private employee benefit plan regulation. Following the enactment of ERISA, Congress several times considered amendments that would have permitted the states to require that employers provide particular types of fringe benefits. The only such waiver passed by Congress, however, is limited to certain provisions of a Hawaii statute that predate ERISA. Passage of this very limited exception to ERISA preemption confirms Congress's understanding that ERISA continues to preempt all other state laws, such as the Maine severance pay statute, that create fringe-benefit payment programs of the sort covered by ERISA.

Furthermore, the decision below is inconsistent with the purposes and policies of ERISA. Congress sought in that statute to balance government regulation and voluntary employer actions in order to provide maximum feasible protection for plan participants and beneficiaries without discouraging the growth of private plans. Congress further sought to avoid duplicative regulation by providing uniform, national standards for the regulation of plans, in order to "minimize[] the need for interstate employers to administer their plans differently in each State in which they have employees" (*Shaw*, 463 U.S. at 105). The Maine severance pay statute contravenes these policies by imposing additional government regulation in an area that Congress left to the discretion of plan designers, and by opening the door to inconsistent state regulation of plans.

ARGUMENT

MAINE'S SEVERANCE PAY LAW IS PREEMPTED BECAUSE IT RELATES TO AN EMPLOYEE BENEFIT PLAN WITHIN THE MEANING OF SECTION 514(a) OF ERISA

The court below erred when it held that the Maine severance pay statute does not have any connection with or reference to an employee benefit plan covered by ERISA. Because the state law supplies all the necessary elements of a severance pay plan and is binding on employers, the Maine statute not only "relates to" but in fact both creates and wholly controls the terms of an ERISA-covered plan, and therefore is preempted by the federal statute.[6]

[6] We do not think that the Maine statute is preempted by the NLRA, however. Unlike ERISA, the NLRA contains no express preemption provision. In *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), this Court held that the NLRA does not preempt state laws mandating inclusion of specified benefits in insurance policies purchased by employers. The Court noted that the NLRA was intended to remedy inequality in bargaining power between employees and employers, and concluded that there was no conflict between the NLRA and state minimum labor standards laws (slip op. 28-29). The National Labor Relations Board has concluded that the decision in *Metropolitan Life* controls here and mandates the conclusion that the Maine severance pay law is not preempted by the NLRA since, as this Court stated, minimum state labor standards laws like the Maine statute "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA" (*id.* at 29).

This case is not distinguishable from *Metropolitan Life*, as Fort Halifax contends (J.S. 12), because it provides unions with a bargaining chip in that they know that employers will be required to pay severance benefits if no agreement on the subject is reached. Any minimum labor standards law grants employees rights that they do not have to bargain for, but this Court held in *Metropolitan Life* that such laws are not inconsistent with the provisions of the NLRA for that reason. There is no good reason why this case is different because the employees can agree to accept less than the mandated amount of severance pay in return for other benefits. Indeed, that factor seems to make the statute less intrusive with respect to the bargaining process rather than more intrusive.

Nor is the Maine law preempted because it prevents employers from implementing their last offer (assuming that that offer did not provide severance benefits at the rate mandated by the statute) if negotiations reach impasse, as the Chamber of Commerce contends in its brief as amicus curiae in support of the jurisdictional statement (at 13-14). There is no apparent basis for the Chamber's contention that Congress, while not intending to bar states from adopting minimum labor standards laws, nevertheless wanted employers to be able to impose offers not meeting such minimum standards if negotiations reached impasse.

Finally, there is little to commend Fort Halifax's contention (J.S. 12-13) that the Maine law is preempted because non-

A. The Language Of Section 514(a) Is Most Reasonably Construed As Preempting The Maine Severance Pay Statute

ERISA broadly defines covered "welfare plans" to include "any plan, fund, or program * * * established or maintained by an employer * * * for the purpose of providing" enumerated types of benefits "for its participants or their beneficiaries." 29 U.S.C. 1002(1). There is no question that the Maine severance pay law requires covered employers to provide severance benefits to former employees, and it is clear that severance pay is a type of benefit that is covered by ERISA. *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1146 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986); *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 324-326 (2d Cir. 1985), aff'd mem., No. 85-441 (June 23, 1986).

In broad language, Section 514(a) of ERISA preempts, with certain exceptions not applicable here, "any and all State laws" that relate to any employee benefit plan" as defined in the statute. 29 U.S.C. 1144(a).[7] As this Court has several times observed,

union employers may escape its terms more easily than other employers, since non-union employers can unilaterally promulgate plans providing lesser severance benefits than those mandated by the statute. That merely illustrates that non-union employers are freer to set employment terms than other employers.

[7] Governmental plans, church plans, plans maintained solely to comply with applicable workers' compensation, unemployment compensation, and disability insurance laws, plans maintained outside the United States primarily for the benefit of non-resident aliens, and excess benefit plans as defined in 29 U.S.C. 1002(36) are not covered by ERISA. § 4(b), 29 U.S.C. 1003(b). Therefore, state laws relating to such plans are not preempted.

this language shows that Congress intended ERISA to occupy the field of benefit plan regulation to the exclusion of the states in order to foster the development of employee benefit plans by relieving employers of potentially conflicting state requirements. *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13 ("[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements"); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983) ("Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees"); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-523 (1981) (Congress made pension plan regulation "exclusively a federal concern").[8] As the Court made clear in *Metropolitan Life* (slip op. 13), ERISA's preemption provision extends to state laws that regulate plan contents even though this is an area left unregulated by ERISA.

This Court has concluded that "relates to" in Section 514(a) must be read broadly, as the normal meaning of the phrase suggests (*Shaw*, 463 U.S. at 96-97), and the decisions of this Court establish that state laws "relate to" ERISA plans insofar as they

[8] The lower federal courts have also noted the broad sweep of ERISA's preemption provision. See, *e.g.*, *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985), aff'd mem. *sub nom. Brooks* v. *Burlington Industries, Inc.*, No. 85-944 (June 23, 1986) (noting "the unparalleled breadth of ERISA's preemption provision").

compel the creation of plans, require employers to provide particular plan benefits, or otherwise regulate the content of plans. Thus, for example, in *Shaw* the Court concluded that "the [New York] Disability Benefits Law, which requires employers to pay employees specific benefits, clearly 'relate[s] to' benefit plans" (463 U.S. at 97). And in *Standard Oil Co.* v. *Agsalud,* 633 F.2d 760, 766 (9th Cir. 1980), aff'd mem., 454 U.S. 801 (1981), this Court affirmed a Ninth Circuit decision invalidating Hawaii's prepaid health care law, which establishes minimum health insurance benefits that employers must provide their employees, on the ground that it "directly and expressly regulates employers and the type of benefits they provide employees" and therefore "must 'relate to' employee benefit plans within the meaning of [ERISA]." Cf. *Metropolitan Life,* slip op. 13 (a Massachusetts law that indirectly regulates plans by requiring the inclusion of mental health benefits in particular kinds of common insurance policies "relates to" employee benefit plans because it effectively requires plans that fund benefits through the purchase of insurance to provide the mandated benefits when they purchase a state-regulated insurance policy).

Maine argues, and the court below held, that Maine's statutorily mandated severance pay program is not preempted because it "does not implicate a plan created by an employer or employee organization" (J.S. App. A8). However, by directing employers to provide fringe benefits of a kind that Congress intended ERISA to cover, the Maine statute requires employers to establish plans covered by ERISA. Although ERISA does not define the various terms used in the definition of "plan," in *Donovan* v. *Dillingham,*

688 F.2d 1367 (1982) (en banc), the leading case construing these provisions, the Eleventh Circuit squarely addressed what constitutes the establishment of a plan under ERISA. The court concluded that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits" (688 F.2d at 1373). The Maine severance pay statute satisfies all of the *Dillingham* criteria by requiring employers to pay certain severance benefits to qualified employees, from general assets, pursuant to specified procedures. It is clear that if an employer stated in a handbook distributed to employees that it would pay severance benefits to employees who had worked for the employer for three years at the rate of one week's pay for each year of employment (the terms of the Maine statute), it would have created an employee benefit plan subject to ERISA under the *Dillingham* criteria.[9] Because the state law contains all the elements of a plan and is binding on employers, and since it must be presumed that an employer intends to comply with applicable state law, there is no need for any further action by the employer independently to manifest the establishment or maintenance of a plan. It follows that since Maine's severance pay

[9] This Court has recognized that informal and unfunded severance pay plans are covered by ERISA and immune from state regulation. *Gilbert* v. *Burlington Industries, Inc.,* 765 F.2d 320, 325-326 (2d Cir. 1985), aff'd mem., No. 85-441 (June 23, 1986); *Holland* v. *Burlington Industries, Inc.,* 772 F.2d 1140, 1145-1146 (4th Cir. 1985), aff'd mem. *sub nom.* *Brooks* v. *Burlington Industries, Inc.,* No. 85-944 (June 23, 1986).

statute mandates creation of ERISA plans of a type not expressly excluded from coverage under the federal statute, the state law relates to employee benefit plans and is preempted.[10]

Moreover, there is nothing in the statute or its underlying policy to support a distinction between plans voluntarily established by employers and plans established as a result of compulsory state laws. To the contrary, as the Ninth Circuit explained in *Agsalud*, "[t]here is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees" (633 F.2d at 764). *Agsalud* involved a challenge to Hawaii's mandatory employee health insurance law. The employer

[10] It appears that the decision below embraces a false dichotomy between state action mandating the payment of benefits and state action mandating the establishment of a plan to provide benefits. Since the state law at issue supplies all the elements of a plan, the only possible distinction between mandating the payment of benefits and mandating the establishment of a plan arises from the absence of certain formalities attendant to the administration of a plan. Plans covered by ERISA, for example, must be established pursuant to a written instrument (29 U.S.C. 1022, 1102) and are subject to ERISA's reporting, disclosure, and fiduciary requirements (see 29 U.S.C. (& Supp. II) 1021-1031, 1101-1114). But, as the court explained in *Dillingham*, the provisions imposing responsibilities on plan administrators and fiduciaries are consequences of, and not prerequisites to, coverage under ERISA (688 F.2d at 1372). Because it is clear that, under Section 514(a), a state cannot mandate the establishment of an ERISA plan, and because there is no legally significant distinction between mandating the establishment of a plan and mandating the payment of a benefit, it follows that a state cannot mandate the payment of a fringe benefit of a type covered by ERISA without running afoul of ERISA's preemption provision.

sought to prevent the state from enforcing recent amendments to the state law requiring plans to cover, in addition to other specified minimum benefits, the diagnosis and treatment of alcohol and drug abuse. The Ninth Circuit rejected the state's argument that its statute was not preempted because it required employers to provide benefits, concluding that "[t]he plans envisioned under the Hawaii statute are * * * not rendered outside the definition of employee welfare benefit plans simply because Hawaii has attempted to make them mandatory" (633 F.2d at 764). This Court's affirmance in *Agsalud* confirms that ERISA does not distinguish between plans that are voluntarily established by an employer and those that are required by state law.[11] As did the state prepaid health care law in *Agsalud*, the Maine severance pay law "relates to" covered plans because it "directly and expressly regulates employers and the type of benefits they provide employees" (*id.* at 766).

The conclusion that ERISA precludes states from mandating the payment of ERISA-covered fringe benefits also follows from the structure of the statute. Section 4(b)(3), 29 U.S.C. 1003(b)(3), expressly exempts from ERISA coverage several types of plans, including those "maintained solely for the purpose of complying with applicable workmen's

[11] Maine mistakenly argues (Mot. to Aff. 11) that the holding of *Agsalud* is limited to circumstances involving the imposition of additional requirements on a pre-existing plan. While it is true that the employer in *Agsalud* had voluntarily provided its employees with a self-funded health care plan that failed fully to comply with the Hawaii law, the decision in that case turned not on the pre-existence of a private plan, but on the broader reasoning that there is no ERISA exemption "for plans which state law requires private employers to provide for their employees" (633 F.2d at 764).

compensation laws or unemployment compensation or disability insurance laws." Section 4(b)(3) thus permits states to require employers to provide certain state-mandated benefits. See *Shaw*, 463 U.S. at 108. But, as the Ninth Circuit, affirmed by this Court, concluded in *Agsalud*, only those types of compulsory plans specifically identified in Section 4(b)(3) are exempted from ERISA's preemptive scope; "the broad preemption of all other compulsory plans prevents state experimentation with other types of programs" (633 F.2d at 765). Because severance pay is not a type of benefit that is exempted from ERISA's coverage by Section 4(b)(3), Maine's compulsory severance pay program is preempted by ERISA.[12]

[12] Maine argues (Mot. to Aff. 12 n.8) that because one purpose of its law is to ease the burdens of unemployment resulting from plant closings, it comes within the statutory exemption for "unemployment compensation laws." But the exemption in Section 4(b)(3) pertains only to plans maintained "*solely*" to provide the specified benefits, and unemployment is not a necessary condition to the receipt of benefits under the Maine statute. Me. Rev. Stat. Ann. tit. 26, § 625-B(3) (Supp. 1986). Cf. *Alessi*, 451 U.S. at 523 n.20 (narrowly construing the exemption for plans maintained solely to comply with state workers' compensation laws as having "no bearing" on plans "which more broadly serve employee needs as a result of collective bargaining").

Moreover, it is clear from Maine law that severance pay and unemployment compensation are different. Maine's unemployment compensation law bases the amount of compensation due on the amount of wages a claimant has earned (Me. Rev. Stat. Ann. tit. 26, § 1191 (Supp. 1986)), and the term "wages" is defined to include severance pay (§ 1043(19)). Thus, receipt of severance pay *increases* the amount of unemployment compensation due; if severance pay was a substitute for unemployment compensation, it would *decrease* the amount owed.

Maine also argues (Mot. to Aff. 8-9) that an "essential element of an ERISA plan," implicit in the overall structure of ERISA, "is that there be an ongoing program of benefits," and that "a one-time payment of benefits is not sufficient to constitute an ERISA plan." There is nothing in the statute that commands this result. To the contrary, ERISA expressly defines the term "welfare plan" to include one type of program, death benefits, that generally involve a one-time payment to beneficiaries. § 3(1), 29 U.S.C. 1002(1).[13] Moreover, ERISA's reporting,

[13] The cases cited by Maine (Mot. to Aff. 9) are not to the contrary. *Martori Bros. Distributors* v. *James-Massengale*, 781 F.2d 1349, amended on other grounds, 791 F.2d 799 (9th Cir. 1986), cert. denied, No. 86-464 (Nov. 10, 1986), involved an order of the California Agricultural Labor Relations Board (ALRB) requiring employers who had failed to bargain in good faith to make whole their employees by paying them a lump sum representing the total value of the compensation package the employees would have received had the employers bargained in good faith, less what they actually received. The Ninth Circuit rejected the argument that, because the make-whole award included a component representing the fringe benefits that would have resulted from good-faith bargaining, it amounted to the creation of a new ERISA plan preempted under Section 514(a). The court emphasized that the award was a payment of damages, and concluded that "[b]ecause the ALRB is not ordering the payment of fringe benefits, there is not even a colorable argument that it has created new ERISA plans" (781 F.2d at 1358). Inasmuch as the court's holding turned on the nature of the award, rather than the frequency of the payment, the court's statement that it is "difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan" (*ibid.*) cannot be read, as Maine contends, to support the proposition that a one-time payment of a fringe benefit can never constitute an ERISA plan.

In *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1504 (1985), the Ninth Circuit applied the *Dillingham* test (see pages 12-13,

disclosure, and fiduciary requirements are relevant to plans that anticipate only a one-time payment of benefits. Information regarding the nature and amount of benefits and the procedures for their payment are of no less importance to participants and beneficiaries who are entitled to receive their benefits in a lump sum than they are to individuals whose benefit payments may continue over a period of time.

B. The Legislative History Of Section 514 Reflects Congressional Intent To Preempt State-Mandated Fringe Benefit Laws

The legislative history of Section 514 confirms Congress's intent to occupy the field of fringe benefit regulation to the exclusion of the states. Sensitive to the fact that the private benefit system is voluntary on the part of employers, Congress determined to minimize the disruptive effect of the new federal law by protecting benefit plans from regulation under inconsistent state laws. Earlier Senate and House versions of the legislation each contained language which appeared to limit ERISA's preemption to contrary or inconsistent state law, leaving the states to regulate where ERISA did not. See *Shaw*, 463 U.S. at 98 & n.18; 120 Cong. Rec. 5002 (Senate version), 4742

supra) to determine that the employer's agreement to pay severance benefits amounted to the establishment of an ERISA plan. The court agreed with *Dillingham* that "a mere allegation that an employer * * * ultimately decided to provide an employee welfare benefit is not enough to invoke ERISA's coverage" (*ibid.*). However, the Ninth Circuit held that the complaint before it clearly contained sufficient allegations showing the existence of a plan to invoke ERISA coverage, and found it unnecessary to determine "the minimum that must be alleged to justify preemption by ERISA" (*ibid.*). As we have shown, in this case the Maine severance pay law supplies all the necessary elements for the establishment of a plan.

(House version) (1974). Both versions were rejected in conference and the present broad language of Section 514(a) was substituted. H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 383 (1974), *reprinted in* 3 Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4277, 4650 (Comm. Print 1976) [hereinafter cited as *Leg. Hist.*].

The House and Senate conferees all stated that the purpose of the broad preemption provision they drafted was to reserve sole authority in the federal government to regulate benefit plans covered by the statute. Senator Javits, one of the principal sponsors of the legislation, explicitly affirmed Congress's intent to occupy the employee benefit plan field completely, while acknowledging that the consequences might often mean no substantive regulation at all. He stated (120 Cong. Rec. 29942 (1974) (quoted 463 U.S. at 100 n.20)): "Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs." See also *Shaw*, 463 U.S. at 99; 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent) (describing "the reservation to Federal authority the sole power to regulate the field of employee benefit plans" as "the crowning achievement of this legislation"); *id.* at 29933 (remarks of Sen. Williams) (ERISA "preempt[s] the field for federal regulation[], thus eliminating the threat of conflicting or inconsistent State and local regulation"). Thus, as this Court noted, the Conference

Committee "indicated that the section's pre-emptive scope was as broad as its language" (*Shaw*, 463 U.S. at 98).

The conferees agreed to assign a Congressional Pension Task Force the responsibility of studying and evaluating the effects of the broad preemption provision, and, with only one relevant exception, Congress thus far has rejected proposals to cut back on the scope of federal preemption. See *Oversight on ERISA, 1978: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 521-686 (1978). That exception involved the Hawaii prepaid health care law at issue in *Agsalud*. In 1983 Congress amended ERISA to create a very limited exemption providing that parts of the Hawaii Prepaid Health Care Act, Haw. Rev. Stat. §§ 393-1 to 393-51 (1976 & Supp. 1984) enacted before ERISA took effect are not preempted. 29 U.S.C. 1144(b)(5), as added by Pub. L. No. 97-473, § 301(a), 96 Stat. 2611.[14] Congress considered that "[t]o exempt from ERISA's preemption the Hawaii Prepaid Health Care Act as it existed on the date ERISA was enacted is purely a matter of equity." 128 Cong. Rec. H9607 (daily ed. Dec. 13, 1982) (remarks of Rep. Burton). Representative Erlenborn, the ranking minority member of the House Committee on Education and Labor, explained that Congress viewed the Hawaii law as "an unusual special case," and considered that "[i]n

[14] The amendment did not save the requirements for compulsory benefits that were added after the enactment of ERISA and had spurred the suit in *Agsalud*. Nor did it exempt from preemption those portions of the Hawaii law that pertained to reporting, disclosure, and fiduciary responsibilities, or rules for plan administration and enforcement, subjects which are regulated by ERISA. 29 U.S.C. 1144(b)(5).

agreeing to the Hawaii exception this body will be reaffirming the broad scope of ERISA preemption and the validity of the interpretation of the Federal courts in connection with the Hawaii statute." 128 Cong. Rec. H9610 (daily ed. Dec. 13, 1982). Accordingly, Congress expressly declined to save any other similar state laws, providing instead that the amendment "shall not be considered a precedent with respect to extending such amendment to any other state law." Pub. L. No. 97-473, § 301(b), 96 Stat. 2612.[15]

Congress's action in 1983 was consistent with its earlier refusals to expand the scope of the Section 4(b)(3) exclusions to ERISA. In 1977 legislation was introduced (S. 1383, 95th Cong., 1st Sess. (1977)) that would have made ERISA inapplicable to employee benefit plans maintained solely for the purpose of complying with state "health insurance laws." See 123 Cong. Rec. 12170 (1977). And in 1979 a bill was introduced (S. 209, 96th Cong., 1st Sess. (1979)) that would have saved the Hawaii health care law as well as any other state law determined by the Secretary of Labor to be "substantially identical" to the Hawaii law. See 125 Cong. Rec. 930, 937 (1979). Neither bill was enacted. The creation of a limited exemption for the Hawaii law, coupled with congressional refusals to further limit the scope of ERISA's preemption provision, shows

[15] The Senate Report stated that "[t]he committee believes that the preemption of the Hawaii Prepaid Health Care Act by ERISA was inadvertent." S. Rep. 97-646, 97th Cong., 2d Sess. 18 (1982). While that statement suggests that the Committee disapproved of the result in *Agsalud*, Congress clearly did not change the general effect of Section 514(a) (since it did not amend that provision), but instead made a limited exception applicable to Hawaii only.

that Congress is aware that ERISA preempts state laws mandating the payment of fringe benefits covered by ERISA, yet has chosen not to alter the pattern of exclusive federal regulation. This congressional understanding that the states are barred from mandating the payment of fringe benefits covered by ERISA in the absence of any exclusion in Section 4(b)(3) is entitled to great weight. See, *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 784-785 & n.12 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 & n.61 (1982).

C. The Purposes And Policies Of The Statute Support The Conclusion That ERISA Preempts State-Mandated Fringe Benefit Laws

Preemption of state fringe benefit laws is also consistent with Congress's intent in ERISA to leave decisions concerning the content of plans "subject to the discretion of * * * plan designers." *Alessi*, 451 U.S. at 525.[16] In ERISA Congress neither required nor forbade employers to provide any particular type of benefit. See *Shaw*, 463 U.S. at 91. Instead, Congress considered a "fundamental aspect" of the law to be "reliance on voluntary action by employers * * * for the establishment of * * * plans." H.R. Rep. 93-807, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 2 *Leg. Hist.* 3115, 3128.[17] Accordingly, a major concern

[16] Because Section 514(a) draws no distinction between pension plans and welfare plans, the preemption principles of Section 514(a), as construed by the Court in *Alessi* and as discussed in the legislative history, apply to cases involving welfare plans, as this Court has recognized (see *Shaw*, 463 U.S. at 105).

[17] See also S. Rep. 93-383, 93d Cong., 1st Sess. 1 (1973), reprinted in 1 *Leg. Hist.* 1069 ("the Committee recognized that private retirement plans are voluntary on the part of the

in the enactment of ERISA was that "governmental supervision of mandated and essential improvements * * * might impede plan growth." S. Rep. 93-127, 93d Cong., 1st Sess. 8 (1973), *reprinted in* 1 *Leg. Hist.* 587, 594. Congress therefore sought "to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations" (S. Rep. 93-127, *supra*, at 13; 1 *Leg. Hist.* 599). To permit states to assert additional governmental control by mandating payment of specified employee benefits would upset this careful balance between private and governmental control over ERISA plans.

Varied state regulation of ERISA-covered fringe benefits also raises another central concern of ERISA's preemption clause. As this Court explained in *Shaw*, even where state laws are not in conflict, compliance with multiple state laws could cause an employer to "reduce wages or eliminate those benefits not required by any State" (463 U.S. at 105 n.25). As this observation reflects, a state requirement that employers increase the amount of a particular fringe benefit will usually result in the lowering of wages or the adjustment of other fringe benefits. Employers subject to the Maine severance pay statute might, for example, revise their retirement plans to provide for lesser benefits. This Court concluded in *Shaw* that "ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with

employer, and, therefore, it has carefully weighed the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits").

the administration of employee benefit plans" (*ibid.*). Thus, the Maine statute at issue in this case involves just the sort of state interference with plans that Congress sought to avoid.

Further, laws like the Maine statute involved here could significantly affect the efficiency of plan administration by leading multistate employers to establish a number of separate state plans or to adjust benefit levels under their plan in different states. As this Court noted in *Shaw*, "the inefficiency of such a system presumably would be paid for by lowering benefit levels" (463 U.S. at 105 n.25).

By narrowly interpreting the term "plan" to exclude state-mandated benefits, the decision below permits a state to do in whole—mandate the payment of severance benefits—what it cannot do in part—regulate the payment of severance benefits payable under a plan. Since under this approach a state could require employers to pay directly from general assets any or all of the fringe benefits enumerated in ERISA that are not covered by an existing plan, the lower court's decision stands as an invitation to other states to mandate the payment of fringe benefits in an attempt to reduce governmental costs associated with public benefit programs. Such laws would be the type of "multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme" that Congress sought to foreclose by enacting Section 514(a). 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). If permitted to stand, the lower court's narrow reading of the term "plan" would undermine Congress's purposes in ERISA of preserving the autonomy of plan sponsors to determine the contents of

their employee benefit plans and providing for the uniform federal regulation of those plans.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

BETTE J. BRIGGS
Attorney
Department of Labor

DECEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 161483 40157

(9)

No. 86-341

In The

Supreme Court of the United States

October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, et al.,

Appellees.

On Appeal From the Maine Supreme Judicial Court

JOINT APPENDIX

John C. Yavis, Jr.
(Counsel of Record)
Murtha, Cullina, Richter
and Pinney
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103
(203) 240-6000
Attorney for Appellant

Thomas D. Warren
(Counsel of Record)
Assistant Attorney General
State House Station 6
Augusta, Maine 04333
(207) 289-3661
Attorney for Appellee Coyne

Notice of Appeal Filed August 4, 1986
Probable Jurisdiction Noted November 10, 1986

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 30, 1981	Complaint filed in Bourgoin, et al. v. Fort Halifax Packing Co., Docket No. CV-81-515
November 2, 1981	Complaint filed in Ewing v. Fort Halifax Packing Co., Docket No. CV-81-516
December 2, 1981	Answer filed in Ewing v. Fort Halifax Packing Co.
January 20, 1982	Answer filed in Bourgoin v. Fort Halifax Packing Co.
March 10, 1982	Plaintiff's First Set of Interrogatories filed in Ewing v. Fort Halifax Packing Co.
May 7, 1982	Defendant's Answers to First Set of Interrogatories filed in Ewing v. Fort Halifax Packing Co.
June 1, 1982	Deposition of Harvey A. McGuire, Jr. filed in Ewing v. Fort Halifax Packing Co.
August 30, 1982	Plaintiff's Motion for Summary Judgment filed in Ewing v. Fort Halifax Packing Co.
September 20, 1982	Defendants' Motion to Dismiss and Motion for Summary Judgment filed in Ewing v. Fort Halifax Packing Co.
October 29, 1982	Opinion and Order filed in Ewing v. Fort Halifax Packing Co.
March 11, 1983	Defendants' Motion for Summary Judgment filed in Ewing v. Fort Halifax Packing Co.

March 18, 1983	Order filed in Ewing v. Fort Halifax Packing Co.: The Motions for Summary Judgment by Defendants, Fort Halifax Packing Co. and Corbett Enterprises, Inc. are denied.
August 17, 1983	Motion to Consolidate Ewing v. Fort Halifax Packing Co. with Bourgoin v. Fort Halifax Packing Co.—Motion granted.
April 1, 1985	Trial
May 2, 1985	Judgment entered against Defendant and in favor of the State for the benefit of the individual employees. Wathen, J.
May 31, 1985	Notice of Appeal to the Maine Supreme Judicial Court filed
June 2, 1986	Opinion and Judgment of the Maine Supreme Judicial Court

Complaint in Ewing v. Fort Halifax
Packing Co., Superior Court,
Kennebec County, Docket No. CV-81-516

[caption omitted in printing]

1. This action is brought pursuant to 26 M.R.S.A. § 625-B, subsections 2 and 5 on behalf of employees of Fort Halifax Packing Company, Inc., and Corbett Brothers (formerly known as Fort Halifax Poultry Company, Inc.), by the Director of the Bureau of Labor Standards, Maine Department of Labor, State of Maine.

2. Plaintiff, Marvin W. Ewing is the Director of the Bureau of Labor Standards as defined in 26 M.R.S.A. § 625-B (5) with an office located at Augusta, Maine.

3. Defendants are Maine corporations authorized to do business in the State of Maine.

4. Defendants bought, sold, traded and otherwise dealt in poultry and poultry products, including, but not limited to, the processing of poultry products, during the 12-month period prior to May 23, 1981.

5. On or about May 23, 1981, Defendants laid off approximately 212 employees.

6. On or about May 23, 1981, Defendants began removing equipment necessary for their operations.

7. Since on or about May 23, 1981, Defendants have been attempting to sell their operations.

8. On or about May 23, 1981, Defendants substantially ceased commercial or industrial operations.

9. Such cessation of commercial or industrial operations constitutes a termination of a covered establishment within the meaning of 26 M.R.S.A. § 625-B (2).

10. Since the employees' last full day of work, one regular pay period has passed and no severance pay has been received by any employee.

WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendants are liable for severance pay pursuant to 26 M.R.S.A. § 625-B.
2. Order that Defendants pay its employees severance pay and interest pursuant to 26 M.R.S.A. § 625-B.
3. Order that Defendants pay Plaintiff its attorneys fees and costs pursuant to 26 M.R.S.A. § 625-B.
4. Grant such other relief as this Court may deem just and proper.

Dated: November 2, 1981

[signatures omitted in printing]

Stipulation of Facts Entered into Evidence at Trial*

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL ACTION No. 83-0020-B

CORBETT ENTERPRISES, INC., et al.,
Plaintiff,

v.

MARVIN W. EWING, et al.,
Defendant.

STIPULATION OF FACTS

NOW COME the parties to this action and stipulate and agree to the folowing facts:

1. Plaintiff Corbett Enterprises is a Missouri Corporation with its principal place of business in West Hartford, Connecticut.

2. Plaintiff Fort Halifax Packing Company (hereafter "Fort Halifax") is a Maine corporation with its principal place of business in Winslow, Maine. Fort Halifax's operations began in 1972 when it purchased all of the assets of the Ralston Purina Company located in

* This stipulation was originally reached in a federal action filed by Fort Halifax and its parent company entitled *Corbett Enterprises, Inc., et al. v. Ewing, et al.*, Civil Action No. 83-0020 B (D. Me., filed February 1, 1983). By agreement of the parties, the stipulation and attached exhibits were received in evidence at trial of this action on April 1, 1985.

Winslow, Maine. The Ralston Purina Company operated a broiler processing and packaging plant on the site since 1961 and previous to that time, the plant was owned and operated by CMT Company, Inc. Fort Halifax presently owns a processing plant and equipment in Winslow, Maine being the same plant it purchased from Ralston Purina.

3. Plaintiff Corbett Brothers is a Maine corporation with its offices in Winslow, Maine, and is a wholly-owned subsidiary of Fort Halifax.

4. Defendants Raymond Bourgoin, Clarence Hachey, Reginald Pooler, Audrey Tyler, Dorothy Dyer, Debbie Lamontagne, Lawrence Belanger, Raymond Cayouette, Alice Gurney, Bertha Knowles and Eugene Bourgoin (hereafter "individual defendants") were employees of Fort Halifax, and all are residents of the State of Maine.

5. Defendant Marvin W. Ewing is the Director of the Bureau of Labor Standards of the State of Maine (hereafter "the Director") and has an office in Augusta, Maine. In that capacity, he has responsibility for enforcement of the Maine severance pay statute.

6. The Amalgamated Meat Cutters and Butcher Workmen of North America, Local 385, AFL-CIO, and its successor United Food and Commercial Workers, Local 385, AFL-CIO, is a labor organization ("Local 385") within the meaning of the NLRA and LMRA and was the exclusive bargaining representative of certain Fort Halifax employees. The most recent collective bargaining agreement between Fort Halifax and Local 385 (attached and incorporated herein as Exhibit I) provides for applicable wages, hours, retirement plan, severance pay and other employee benefits.

7. The retirement plan provided for and required by Section 5 of the collective bargaining agreement (Exhibit I) is the Corbett Enterprises, Inc. Retirement Plan For Production Employees (the "Production Employees' Plan") (attached hereto and incorporated as Exhibit II).

8. Corbett Enterprises, Inc., is the administrator of the above noted Production Employees' Plan.

9. Corbett Enterprises, Inc. also maintains a plan for covering the administrative and clerical employees of Fort Halifax and Corbett Brothers entitled Corbett Enterprises, Inc. Retirement Plan for Sales, Administrative and Clerical Employees. The "Administrative Plan" is attached hereto and incorporated herein as Exhibit III.

10. Corbett Enterprises is the administrator of the above noted "Administrative Plan".

11. The above noted plans have been determined by the Internal Revenue Service (IRS) to be qualified plans and meet and comply with the eligibility requirements, reporting requirements, funding standards and other obligations imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. (see Exhibits IV and V attached).

12. Fort Halifax and Corbett Brothers produced and processed poultry and poultry products in Maine from 1972 until May 23, 1981. On May 23, 1981, Fort Halifax ceased all poultry operations and laid off most of its employees except several maintenance men and clerical employees. In June 1981, the plaintiff Corbett Brothers sold their egg packing plant, one hatchery, one feed mill, inventory and rolling stock to Corbett Farms. Efforts to reopen the Fort Halifax plant have not succeeded.

13. On or about November 1, 1981, the Director instituted suit in the Maine Superior Court for Kennebec County against Fort Halifax and Corbett Brothers entitled *Ewing v. Fort Halifax Packing Company et al.*, CV 81-56 on behalf of all the employees of Fort Halifax and Corbett Brothers to recover severance pay for these employees pursuant to 26 M.R.S.A. § 625-B.

14. On or about October 30, 1981, the individual defendants instituted suit in the State of Maine Superior Court for Androscoggin County against Fort Halifax entitled *Bourgoin et al. v. Ft. Halifax Packing*, CV 81-515 to recover severance pay for those individual defendants pursuant to 26 M.R.S.A. § 625-B.

15. On or about October 29, 1982, in the action commenced by the Director, the Maine Superior Court for Kennebec County issued a partial summary judgment attached as Exhibit VI.

[signatures omitted in printing]

EXHIBIT I

TO STIPULATION

AGREEMENT

BETWEEN

FORT HALIFAX PACKING COMPANY

WATERVILLE, MAINE

(SEAL)

AND THE

AMALGAMATED MEAT CUTTERS

AND

BUTCHER WORKMEN OF

NORTH AMERICA

A.F.L.-C.I.O., LOCAL NO. 385

EFFECTIVE: 6/2/79

EXPIRES: 6/2/82

AGREEMENT

AGREEMENT, made and entered into this 20th day of June, 1979, by and between FORT HALIFAX PACKING COMPANY, hereinafter called the "Company," and the AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL 385, hereinafter called the "Union."

WITNESSETH

For the intent and purposes of promoting and perpetuating friendly and efficient relations between the Company, the Union and the employees, and to establish fair and equitable working conditions of employment, the following Agreement is entered into.

ARTICLE I

RECOGNITION

Section 1. Bargaining Unit.

The Company hereby recognizes the Union as the sole collective bargaining agency for all of its employees, except those engaged in a supervisory, clerical and office capacity and live haul drivers and catchers who bring poultry into the processing plant.

ARTICLE II

UNION SHOP

Section 1. New Employees.

The Company may secure new employees from any source.

Section 2. Union Security Clause.

a. All present employees who are members of the Union on the date on which this Agreement is signed shall remain members in good standing of the Union as a condition of employment.

b. All present employees who are not members of the Union and all employees who are hired hereafter shall become and remain members in good standing of the Union

as a condition of employment on and after the 31st day following the beginning of their employment or on or after the 31st day following the date on which this Agreement is signed, whichever is the later.

c. It is specifically understood and agreed that anyone newly employed shall be employed on a thirty (30) day trial basis, during which time he shall be considered on probation and may be discharged by the Company, within the thirty (30) day trial period only, for any reason whatsoever and in its sole discretion.

Section 3. Union Membership.

The Union agrees that it will admit to and retain in membership all employees without discrimination so long as such employees tender the initiation fee and periodic dues uniformly required for membership by the Constitution of the International Union and the By-Laws of the Local Union.

Section 4. Failure to Pay Dues.

In the event that any employee fails to comply with Section 2 provided for in this Article, or fails to tender the initiation fee and periodic dues uniformly required as a condition of membership, the Union may notify the Company in writing requesting the dismissal of such employee. The said employee shall be discharged by the Company within seven (7) days of receipt of said letter, provided that such discharge shall be permitted by law.

ARTICLE III

CHECK-OFF

Section 1. Deduction of Union Dues.

On the first pay day of each month, the Company shall deduct from the wages of each employee covered by this Agreement the regular union dues on or before the tenth (10th) day of each month.

Section 2. Authorization for Deductions.

The Company further agrees to continue to send the Local Union a copy of the employee's authorization card.

ARTICLE IV

UNION REPRESENTATION, GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Plant Visits by Union Representatives.

A duly authorized representative of the Union shall be permitted to visit the various plant operations covered by this Agreement for the purpose of observing working conditions and shall also be permitted to check payroll records to see that this Agreement is fully carried out. It is agreed that the Union Representative shall first announce his presence to the Manager of the plant and advise of his visit. The Union further agrees that his visit shall not interfere with production.

Section 2. Shop Stewards.

It is further agreed that members of the Union, who are employees of the Company, may be designated by the

Union to act as shop stewards at the Company's place of business. The Union will supply the Company with the names of those appointed as stewards. While the chief steward and the department stewards are designated to represent employees in the grievance procedure, they shall at all times be subject to all applicable company rules and regulations and their duties as stewards shall not be permitted to unduly interfere with the performance of their duties as employees of the Company. If it is necessary for a steward to leave his job to handle a grievance, then the steward shall first notify his immediate supervisor and the supervisor will allow the steward to leave his job unless his absence will seriously interrupt production. It is agreed that whenever it is necessary for both the chief steward and the department steward to be relieved from their jobs in order to adjust a grievance that they will be allowed to do so unless, of course, the absence of either will seriously interrupt production. In keeping with this effort by both parties to minimize any interruption of work, the Company agrees to make available at such grievance meetings the company representative at the proper management level who has the authority to resolve such grievance.

Section 3. No Discrimination.

No employee shall be discriminated against or discharged because of activities on behalf of, or membership in, the Union, or for reasons of creed, color, sex, age, or national origin.

Section 4. Disciplinary Action.

The Union shall at all times reserve the right to challenge any disciplinary action against any employee through the grievance and arbitration procedure provided in this Agreement.

Section 5. Grievance and Arbitration Procedure.

In the event a grievance arises concerning the interpretation or application of the terms of this Agreement between the Union or any employee and the Company, such grievance shall during the term of this Agreement be determined in accordance with the following procedure:

Step 1: The employee and his steward shall present the grievance orally to the employee's foreman within five (5) days of the occurrence of the matter over which the employee grieves. When the grievance is submitted to a foreman he shall submit his answer orally, within three (3) days of receiving it.

Step 2: A grievance not satisfactorily resolved under Step 1 may be carried forward by the union steward submitting it in writing to the Plant Superintendent. At the request of either party, any appropriate company officials or official of the Union may meet at this Step to attempt to settle the grievance before it is formally submitted to arbitration.

Step 3: If the answer given by the Company under Step 2 above is not satisfactory to the Union, the Union may submit the grievance to arbitration by notifying the Company in writing that it wishes to request arbitration. Such notice must be made within thirty (30) days following the giving of the Company's answer under Step 2

above. After a request has been made by the Union to the Company to submit a case to arbitration, representatives of the Company and the Union will promptly get in contact with each other for the purposes of selecting an arbitrator to hear the case. In the event the parties are unable to agree upon a selection of an arbitrator, they shall submit a joint request to Federal Mediation and Conciliation Service to furnish a list of names of five (5) arbitrators from which list the parties shall select one arbitrator by alternately striking names. Prior to the opening of the arbitration hearing, the parties will attempt to agree upon a stipulated issue for the arbitrator to decide and the arbitrator shall be limited to such issue when making his decision. If the parties are unable to agree upon a stipulated issue, the arbitrator shall decide the issue. The decision of the arbitrator shall be final and binding upon all parties to the dispute. However, the arbitrator shall have no power to change, subtract from or add to the provisions of this Agreement and shall only have the power to apply and interpret the provisions of this Agreement in reaching his decision. The expenses of the arbitrator shall be divided equally between the parties.

ARTICLE V

SENIORITY

Section 1. Layoffs.

In the allocation of work, the layoff of employees, and the rehiring of employees, seniority shall prevail. The sole restriction on seniority shall be the ability to perform the job. Each month the Company shall furnish a corrected seniority list to the Union when submitting pay-

ment of dues. Stewards shall be the last employees to be laid off for lack of work, irrespective of their seniority.

Section 2. Promotions.

In the event of a vacancy occurring, the Company shall immediately post a notice stating both the pay group in which the job is open and the job which the employee will normally perform. Preference to such job shall be given to the person with the highest seniority downward, providing that such employee is qualified for the work. When in the opinion of the Company, an employee cannot qualify, such decision of the Company shall immediately be subject to the grievance procedure, including arbitration. It is further understood that the employee who is awarded the bid shall still be expected to perform any other work for which he is qualified and that the Company may assign him such work.

Section 3. Absences.

Authorized absence, or temporary (up to one year) layoff, shall not interrupt an employee's seniority. When the Company is notified of a bona fide sickness or accident, such bona fide sickness or accident shall constitute an authorized absence.

Section 4. Re-employment of Laid Off Employees.

Laid off employees shall be re-employed by seniority if they report within seven (7) days from date notice is given. When notice is given orally or by telephone and the employee fails to return to work, then the Company shall confirm its original notice by giving a written notice; a copy shall also be sent to the Union. For the purpose of forfeiting seniority, an employee may still forfeit his

seniority by not reporting to work within seven (7) days from the written notice being given but he shall not forfeit seniority unless an actual written notice is given.

Section 5. Leave of Absence for Union Business.

Employees, when called upon to serve as officers, or delegates to any union conference or convention, shall be granted the necessary leave of absence, without pay, insuring their seniority status. Prior notice shall be sent to the Company by the Union.

Section 6. Loss of Seniority.

All seniority rights shall be lost for any of the following reasons:

a. An employee quits or is discharged for proper cause.

b. An employee is laid off over one (1) year.

c. After a thirty (30) day trial period, an employee accepts a position with the Company which is not covered by this Agreement.

d. An employee, while on leave of absence accepts work elsewhere (except for employment with the Union), unless he has written permission from the Company and the Union is funished with a copy of such permission at the time such is granted.

e. An employee fails to report from a layoff within seven (7) days after date notice was given, providing that the Company followed it up with a written notice in cases where the employee did not return to work as instructed.

ARTICLE VI

MISCELLAN OUS CONDITIONS

Section 1. First-Aid Equipment.

Adequate first-aid equipment shall be kept readily convenient and accessible to employees.

Section 2. Rest Period.

Each employee shall be granted a ten (10) minute rest period, without loss of pay, both in the mid-morning and in the mid-afternoon. If more than ten (10) hours are to be worked, a ten (10) minute rest period shall be granted as near the end of eight (8) hours as is practicable.

Section 3. Injuries on the Job.

If, for any reason, an employee is injured on the job, the Company shall provide a means of transportation to the employee's home or to the hospital or doctor. If such employee is sent home by the company nurse or doctor due to an industrial accident, he or she shall be paid for the full scheduled workday for the day of the industrial accident. If subsequent doctor visits are required as a result of an occupational injury, the Company will schedule such visits for the employee after line time when possible if the employee has returned to work. When the Company itself schedules an employee to visit the doctor for an occupational injury then the employee will be compensated for time lost. Further, if an employee is required to visit the doctor during work time and the employee does not have his or her own means of transportation to the doctor, then the employee, if the employee requests, will

be provided transportation by the Company in order to visit the doctor.

Section 4. Prior Privileges.

Any privileges which are not covered by this Agreement, and which are now enjoyed by the employee, shall continue during the life of this Agreement.

Section 5.

When it is necessary to work any production line overtime, all such work will be performed by bargaining unit employees.

ARTICLE VII

REPORT-IN PAY

Whenever an employee, unless otherwise directed prior to normal departure for work, reports for work on any regular scheduled working day, he or she shall be provided with a minimum of four (4) hours' work or four (4) hours' pay in lieu thereof. However, the Company shall not be liable for the reporting time as herein provided for in the event the Company is unable to provide work because of fire, flood, an act of God, failure of power or lack of heat or any other factors beyond the control of the Company. However, any employee called in to work, for other than his regular schedule, shall receive a minimum of four (4) hours' work or pay in lieu thereof, in any event.

ARTICLE VIII

INDIVIDUAL AGREEMENT

The Company shall not enter into any individual agreement with any of the employees covered by this

Agreement in conflict with the same. No employee shall be compelled to cross a legal picket line of any other employer where labor trouble exists.

ARTICLE IX

BULLETIN BOARD

The Company shall continue to furnish suitable bulletin boards for posting of union notices to be stationed in places readily accessible to the employees.

ARTICLE X

NO REDUCTION OF WAGES

There shall be no reduction of wages due to the signing of this Agreement.

ARTICLE XI

HOURS

Section 1. Workweek.

The workweek shall consist of five (5) days, forty (40) hours, with the understanding that such work is not guaranteed. The payroll week begins at 12:01 a.m. Sunday and ends at 12:00 p.m. on the following Saturday.

Section 2. Overtime.

All work performed on any of the holidays listed in Article XIII and on the seventh (7th) consecutive day worked shall be paid for at double time the employee's regular hourly rate of pay. A sixth (6th) consecutive day worked within the workweek shall be paid for at time and one-half the employee's regular rate of pay. If a paid

holiday falls within the week, and the employee is eligible for holiday pay, and has actually worked all regular hours scheduled during that workweek, then the employee shall be entitled to time and one-half his regular rate of pay for all work performed on Saturday of that week.

Section 3. Overtime Pay.

It is further understood that overtime pay for work on any of the holidays listed in Article XIII shall be in addition to the regular holiday pay.

Section 4. Distribution of Overtime.

When necessary to work overtime, such overtime shall be distributed among senior employees having the ability to perform the needed work.

Section 5. Daily Starting time.

The regular daily plant starting time shall be decided upon by the Company and the Union. Any employee reporting for work at his scheduled starting time and then required to stand by while waiting for work shall be paid for such time.

Section 6. Daily Overtime.

An employee shall receive one and one-half (1-1/2) times his regular hourly rate for all hours worked in excess of eight (8) hours in one day.

All hours worked in excess of ten (10) hours per day shall be paid for at double the employee's regular hourly rate of pay.

Section 7. Weekly Overtime.

All hours worked in excess of forty (40) hours per week shall be paid for at one and one-half (1-1/2) times the employee's hourly rate.

Section 8. No Pyramiding Clause.

There will be no pyramiding of overtime or premium rates. Only the highest single premium rate applicable will be paid for the work performed.

Section 9. Lunch Periods.

Lunch periods of at least one-half (1/2) hour shall be granted each employee who works a full day. Lunch periods shall commence between 11:00 a.m. and 12:00 noon on first line.

Section 10. Emergency Relief.

Employees whose jobs require 100% attention while the line is running, such as killers, machine operators, hangers, etc., shall be afforded emergency relief if and when necessary.

Section 11. Intent to Try to Provide Full Workweek.

While both the Union and the Company agree that nothing in this Agreement is to be construed as a guarantee of the number of hours of work per day or per week, it is the intent of both parties to strive to see that employees get a full workweek each week that the plant is operating.

ARTICLE XII

VACATIONS

Section 1. Amount of Vacation.

a. Employees covered by this Agreement who have completed one or more, but less than three (3) years of continuous service with the employer shall be granted one week of vacation with pay after their anniversary date of such required length of service.

b. Employees who have completed three (3) or more years of continuous service, but less than ten (10) years, shall be entitled to two (2) weeks of vacation with pay.

c. Employees who have completed ten (10) years of continuous service, but less than twenty (20) years, shall be granted three (3) weeks of vacation with pay.

d. Employees who have completed twenty (20) years of continuous service, shall be granted four (4) weeks of vacation with pay.*

* Commencing June 2, 1981, employees who have completed eighteen (18) years of continuous service, shall be granted four (4) weeks of vacation with pay.

e. Employees who have completed twenty-five (25) years of continuous service, shall be granted five (5) weeks of vacation with pay.

Section 2. Vacation Pay.

Employees who have received forty (40) weekly pay checks, or the equivalent thereof, during their anniversary year of employment shall be paid forty (40) hours at their straight-time regular rate of pay for each week of vacation. Weekly-rated employees shall receive their weekly rate for

each week of vacation due. The above requirement that an employee has received forty (40) weekly pay checks or its equivalent shall be reduced to thirty-two (32) weekly pay checks or the equivalent thereof in cases of employees with five (5) or more years' seniority who would have met the forty (40 weekly pay check requirement had it not been for absence during the anniversary year because of sickness or pregnancy. In cases where there is some dispute, the Company may require the employee to submit evidence of such sickness or pregnancy.

Section 3. Continuous Service.

Continuous service in this vacation plan is defined as service of an employee who has not lost seniority.

Section 4. Right to Vacation Pay.

Employees who quit or are discharged and have vacations earned which have not been taken by them shall receive such vacation pay.

Section 5. Time of Vacation.

Vacation shall be taken at such time as may be agreed upon by management, it being understood that the Employer will endeavor to have vacations during slack periods. Employees having the greatest seniority shall be given preference as to the time which the Employer may allot for vacations. Vacations may not be accumulated by being carried over and taken during the following anniversary year.

Employees who perform maintenance work during the Thanksgiving week shutdown and are eligible for vacation may elect to take vacation pay in lieu of vacation or take a week of their accrued vacation at another time mutually acceptable with management.

Section 6. Request for Vacation.

On March 1 of each year the Employer shall post a vacation chart and all employees entitled to vacations shall specify their preference of vacation period. Such chart shall be taken down on April 1st and the Company shall prepare from it a vacation schedule giving preference on vacation periods in accordance with plant seniority. Employees entitled to three (3) weeks' vacation shall be permitted to take two (2) weeks' consecutively where possible. The Company shall then post such vacation schedule not later than April 15th. No vacation assignments shall then be changed except by mutual agreement between the Company and the employee.

ARTICLE XIII

HOLIDAYS

Section 1. Number of Holidays and Eligibility.

Pay for holidays not worked:

All employees with seniority shall be paid for eight (8) hours at their straight-time hourly rate for:

New Year's Day	Thanskgiving Day
Washington's Birthday	Christmas Day *
Memorial Day	Good Friday
Independence Day	Veteran's Day
Labor Day	

* During the second year of this Agreement, Christmas holiday pay shall consist of twelve (12) hours' straight-time pay.

(All holidays will be observed on the date recognized by the Federal Government.)

provided they report for work and work the hours as required by the Employer on their scheduled workday before and their scheduled workday after the holiday unless excused for illness and/or just cause. The purpose of this provision in the preceding sentence is to discourage tardiness and absenteeism on the workday before and the workday following the holiday. This provision shall not apply to employees who are on temporary layoff during the month preceding or the month following the holiday. An employee who is on an authorized sick leave at the time of the holiday and who performs work during the month in which the holiday occurs will be entitled to holiday pay.

Section 2. Holiday Occurring During Vacation.

If one of the above holidays covered by Section 1 of this Article occurs within an employee's vacation period, he shall be granted one additional day of vacation for which he shall receive eight (8) hours' pay at his straight-time hourly rate of pay. This additional day shall be taken at the time mutually agreeable to the Company and the employee.

Section 3. Pay for Work on Holiday.

All production work performed on the above holidays shall be paid for at double the employee's regular rate of pay in addition to any holiday pay the employee is eligible for as above.

ARTICLE XIV

GROUP INSURANCE

Section 1. Life Insurance.

The Company agrees to continue for the life of this Agreement the same life insurance coverage provided by the prior Agreement which expired June 2, 1979.

Section 2. Combination Life and Health Plan.

The Company agrees to continue for the life of this Agreement the same Combination Life and Health Plan that was provided by the prior Agreement which expired June 2, 1979.

Section 3. Major Medical.

The Company agrees to continue for the life of this Agreement the same Major Medical Insurance coverage provided by the prior Agreement which expired June 2, 1979. In addition to that Major Medical Insurance coverage, commencing December 1, 1980 the Company will increase the Major Medical coverage in accordance with discussions with the Union during negotiations which will raise the coverage from thirty thousand ($30,000.00) dollars to one hundred thousand ($100,000.00). The Company also agrees that after the coverage under the basic health plan is exhausted insofar as miscellaneous costs, these miscellaneous costs will be covered under the Major Medical plan in accordance with the deductible and eighty/twenty co-insurance provisions provided for all other Major Medical coverage.

Section 4. Dependent Coverage.

The Company further agrees to make available to employees covered by this Agreement the dependent coverage for the Combination Life and Health Plan provided the employee desires this coverage and pays the appropriate weekly premium. The Company also agrees to deduct the amount of this premium from the employee's weekly pay provided the employee executes the necessary authorization. The additions made in the employee's individual coverage

will also be added to the dependent coverage. Effective June 2, 1979, the Company agrees the employee's cost for the dependent coverage will be an amount of $3.63 per week. Effective June 2, 1980, the Company agrees to roll back the employee's cost for the dependent coverage to an amount of three ($3.00) dollars per week. Effective June 2, 1981, the Company agrees to roll back the employee's cost for the dependent coverage to an amount of two ($2.00) dollars per week.

Section 5. Retirement Plan.

The Company agrees to provide a Retirement Plan providing benefits no less than the level provided by the Ralston Purina Company when it owned and operated the plant. Further, the eligibility requirements under the new plan will be no more stringent than those under the Ralston Purina plan. This pension plan commenced as of February 5, 1972—the date when Ralston Purina Company sold the plant to the Company.

It is further understood and agreed that questions or controversies about this Plan or its administration shall not be subject to the grievance and arbitration provisions of Article IV of this Agreement.

It is further agreed that in the event the Company elects to make any improvements in the pension plan during the term of this Agreement, such improvements shall be made applicable to the Plan covering these employees under this Agreement.

Section 6. Sickness and Accident Plan.

The Company will continue for the life of this Agreement the same Sickness and Accident Plan provided by the prior Agreement which expired June 2, 1979.

ARTICLE XV

WEARING APPAREL

The Company agrees to furnish, without cost to the employees, all special wearing apparel (including insulated gloves for the chiller hangers), tools, equipment and safety devices necessary to the performance of the work required to be done and further agrees to keep all such equipment, etc., in good condition and proper working order. Employees shall be responsible to return all equipment issued by the Company before new issue of equipment is made, and on leaving the Company's employ, deductions may be made from any amounts due the employee upon failure to return equipment when required to do so.

As a convenience for employees in purchasing plastic boots, safety shoes, and work gloves, the Company will implement, as soon as it is able to work out all the details, a program whereby employees can order and purchase at the plant, such apparel at the supplier's price.

ARTICLE XVI

WAGES

Section 1. Wage Rates.

The following hourly rates shall prevail as minimum rates for the term of this Agreement, effective as indicated. The starting rate for all new employees during their first thirty (30) days (thirty calendar days from their date of hire but starting with the next workweek after such thirtieth day of employment) shall be fifteen cents (15¢) per hour less than the rates set forth in the columns listed below.

WAGE SCHEDULE

CLASSIFICATION	Effective 6/2/79	Effective 6/2/80	Effective 6/2/81
"A" RATE			
Killers	$4.49	$4.79	$5.14
Markers	4.49	4.79	5.14
Fork Lift Driver	4.49	4.79	5.14
Yard Driver	4.49	4.79	5.14
"B" RATE			
Turners	4.27	4.57	4.92
Leg Cutters	4.27	4.57	4.92
Ice Man	4.27	4.57	4.92
Utility	4.27	4.57	4.92
Helpers	4.27	4.57	4.92
Night Cleaners	4.27	4.57	4.92
Box Makers	4.27	4.57	4.92
Strappers	4.27	4.57	4.92
Hangers	4.27	4.57	4.92
Feathermen	4.27	4.57	4.92
Packers	4.27	4.57	4.92
Shippers	4.27	4.57	4.92
Knife Sharpeners	4.27	4.57	4.92
Spin Chill Operators	4.27	4.57	4.92
Lung Machine Operators	4.27	4.57	4.92
Truck to Line Tenders	4.27	4.57	4.92
"C" RATE			
All Others	4.20	4.50	4.85

It is the intent of the parties to this Agreement that all employees on the Company's payroll and covered by the Agreement as of May 14, 1979 shall receive an increase of thirty cents (30¢) per hour. All employees on the company payroll and covered by this Agreement as of June 2, 1980 shall receive increases of thirty cents (30¢) per hour. All employees on the company payroll and covered by this Agreement on June 2, 1981 shall receive increases of thirty-five (35¢) per hour.

Each employee shall be assigned one of the above classifications and no employee shall receive less than the appropriate rate.

In the event of a vacancy in the "B" rate, employees who are qualified for the work will be eligible to bid and will be considered by the Company in filling the vacancy.

All time working on the vent gun, using knife and saw on cut-up line, washing boxes, neck cracking and work on utility table will be paid at "B" rate.

For time working hanging live birds, loading or unloading trucks, an employee will be paid twelve cents (12¢) per hour above the "B" rate.

Section 2. New Equipment or Machinery.

In the event of the installation of any new equipment or machinery or any other change which in any way affects the content or operation of any job, the classification and rates herein listed shall be subject to negotiation between the Company and the Union, and failure to agree on new or changed classifications and rates by the parties hereto shall be subject to arbitration. The institution of a second or third shift of production shall be considered a change of sufficient substance and magnitude to be considered as falling within and subject to the provisions of this section.

Section 3. Temporary Transfer to Higher Job Classification.

Whenever an employee is transferred to a higher job rate classification, such transfer shall not be considered temporary for more than four (4) weeks except in the case of the regular employee on that job being absent due to illness or injury. Whenever an employee is temporarily transferred to a higher classification, other than transfers of a short duration such as for relief, such employee shall receive the higher job rate. It is further agreed that if an employee is temporarily assigned to work on a lower rated job, the employee will not have his rate reduced.

ARTICLE XVII

FUNERAL LEAVE

In the event of a death of an employee's spouse, child or stepchild, the employee will be granted up to five (5) days' leave without loss of pay.

In the event of a death of an employee's parent, brother or sister, the employee shall be granted up to three (3) days' leave without loss in pay.

In the event of a death of an employee's mother-in-law, father-in-law, brother-in-law or sister-in-law, the employee shall be granted one day leave without loss in pay.

ARTICLE XVIII

MANAGEMENT RIGHTS, NO STRIKE—NO LOCKOUT

Management retains its traditional management prerogatives except to the extent that they are forfeited or otherwise abridged by the terms of this Agreement. It is further agreed that during the life of this Agreement the Union will not cause or sanction a strike nor will an employee or employees take part in a strike, slowdown in the rate of production or other interferences or stoppage of the Company's work. The Company agrees not to conduct a lockout or shutdown for an anti-union purpose during the term of this Agreement.

ARTICLE XIX

TERM

This Agreement between the Company and the Union shall be effective from June 2, 1979 and shall remain in full force and effect until June 2, 1982, and shall continue for an additional year unless either party shall notify the other by registered mail at least sixty (60) days prior to June 2, 1982, that it intends to terminate or amend the present Agreement.

This Agreement shall be binding upon the Company, its successors and assignees.

IN WITNESS WHEREOF, the Company and the Union have hereunto caused this Agreement to be signed, sealed and delivered, in their names by their authorized agents this 20th day of June, 1979.

FORT HALIFAX PACKING COMPANY Waterville, Maine	AMALGAMATED MEAT CUTTERS AND BUTCH- ER WORKMEN OF NORTH AMERICA, AFL- CIO, LOCAL 385

[signatures omitted in printing]

MEMORANDUM OF AGREEMENT

THIS AGREEMENT, made and entered into this 1st day of November, 1981 by and between Ft. Halifax Packing Company, hereinafter called the "Company" and Local 385 of the United Food and Commercial Workers Union, AFL-CIO, hereinafter called the "Union" amends the existing collective bargaining agreement which is due to expire on June 2, 1982.

For the intent and purposes of maintaining and perpetuating the operation, especially in light of present economic conditions in the poultry industry in the State of Maine, the following amendments are entered into:

1. Article XI, Section 6, *Daily Overtime*, is deleted. Instead insert, Time and one half for all hours in excess of nine (9) hours in one day.

2. Article XIV, Section 4, *Dependent Coverage*, is amended as follows:

> "(a) The Company further agrees to make available to eligible employees covered by this Agreement the dependent coverage for the Combination Life and Health Plan provided the employee desires this coverage and pays the appropriate weekly premium. The Company also agrees to deduct the amount of this premium from the employee's weekly pay provided the employee executes the necessary authorization." (Delete the rest of Section.)

3. Add a Section 4(b), *Cost of Insurance:*

> "The Company agrees to pay 50% of an employee's premiums for the Combination Life and Health Plan, Major Medical Insurance coverage and the dependent coverage for all eligible employees who elect to participate in the plan."

4. Article XVI, *Wage Rates*, add the following to Section 1:

> "The wage rates presently in effect shall remain in effect until June 2, 1983. At which time either party to this Agreement may propose adjustments in the rates of pay by giving to the other party sixty (60) days written notice of its desire to negotiate wage adjustments."

5. Add new Article XIX, *Severance* provisions:

"While it is the hope of the Company that it will not be necessary to consider closing the operation covered by this Agreement, it is recognized by the parties that the feasibility of continued operation of any plant is a question of its being able to have the business, productivity and efficiency to justify a reasonable rate of return or profit on the investment of the inventors to the operation. Because of the fact that such plant closing, while not presently contemplated, always remains a possibility, the parties have agreed that provisions be made in this Agreement defining the right of the employees covered by this Agreement should such occur. Therefore, the parties agree that in the event the Company should permanently discontinue operations, and in such event only, the following special severance provisions will apply to persons laid off from the Company's employment as a result of such permanent closing. It is understood that persons who after notice of such termination elect voluntarily to leave the Company's employ before the shut down to accept other employment, or who refuse to return from any temporary layoff, shall be considered as having quit their employment and shall not be entitled to the benefits of the following provisions:

1. Each such employee who has, at the time of being laid off, attained the age of 55 years, may exercise his early retirement option provided in the Company pension, if he so elects. An employee who elects to exercise the rights granted in this Section shall remain eligible for the benefits provided in sub-paragraphs 2 and 3 of this Article.

2. For purposes of determining eligibility to receive holiday pay for any paid holiday occurring within 30 days following the scheduled date for such discontinuance of operation, each employee shall be considered in the employ of the Company until the holiday, and provision of Article XIII, Section 1 shall be waived as to any such employee who is permanently laid off prior to such holiday.

3. Employees covered by this Agreement who at the date of the closing have completed two or more years of service will be granted severance pay under the following formula:

   2 years but less than 3 years—1% of the previous years earnings or 20 hours pay, whichever is more.

   3 years but less than 4 years—2% of the previous years earnings or 40 hours pay, whichever is more.

   4 years but less than 5 years—3% of the previous years earnings or 60 hours pay, whichever is more.

   5 years but less than 6 years—4% of the previous years earnings or 80 hours pay, whichever is more.

   6 years but less than 7 years—5% of the previous years earnings or 100 hours pay, whichever is more.

   7 years but less than 8 years—6% of the previous years earnings or 120 hours pay, whichever is more.

   8 years but less than 9 years—7% of the previous years earnings or 140 hours pay, whichever is more.

   9 years or more—8% of the previous years earnings or 160 hours pay, whichever is more.

4. In entering into this contractual provision for severance pay, both the Company and the Union, as well as its membership, recognize that such severance provisions are agreed upon in accordance with the collective bargaining exceptions to and in lieu of state law severance provided in the Severance Pay Provisions of the Maine Severance Law. In consideration of this Agreement, the Company not only agrees to the provisions

provided herein, but further agrees to pay all severance pay due within 15 days of the closing to all eligible employees who qualify in the event these provisions become applicable."

6. New Article XX:

"The parties agree that effective June 3, 1983 the provisions of Article XI, Section 6, *Daily Overtime* and Article XIV, Section 4, *Dependent Coverage,* as set out in the prior Agreement, which was amended by this Agreement, shall again become effective."

7. Article XIX is now changed to be Article XXI:

"The Company and the Union agree that this Amendment extends the existing collective bargaining agreement presently due to expire on June 2, 1982 until June 2, 1984, except for the new agreement provided in Article XVI concerning wages which provides for reopening of the contract to negotiate wages under Article XIV to take effect after June 2, 1983, provided that the party desiring the change gives the other party at least sixty days written notice of its intent to negotiate adjustments. In the event either party does provide such notice, then the parties shall meet within thirty days of the receipt of said notice for discussion, and endeavor in good faith to reach an agreement. If an agreement is not reached by the expiration of the sixty day period (unless that period is extended by mutual consent), then the Company may maintain the rates of pay or wages in effect or upon ten days written notice make its proposed changes. If the Union is dissatisfied with the Company's action, it shall then be free to take such economic action as it sees fit upon ten days written notice given after the expiration of said sixty day period and such action shall not violate the no-strike article of this Agreement.

This Agreement shall be binding upon the Company, its successors and assignees."

IN WITNESS WHEREOF, the Company and the Union have hereunto caused this Agreement to be signed, sealed and delivered in their names by their authorized agents this 17th day of November, 1981.

FT. HALIFAX PACKING COMPANY
Waterville, Maine

LOCAL 385, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

[signatures omitted in printing]

EXHIBIT II

TO STIPULATION

CORBETT ENTERPRISES, INC.
RETIREMENT PLAN FOR PRODUCTION EMPLOYEES [Excerpts*]

Article	*Title*
I	Definitions
II	Eligibility
III	Contributions
IV	Retirement Benefit
V	Death Benefits
VI	Rights of Participants on Termination of Employment Prior to Retirement Date
VII	Permanent and Total Disability Benefit
VIII	Funding
IX	Fiduciary Responsibility
X	Pension Committee
XI	Rights of Affiliated Companies to Terminate or Discontinue
XII	Termination of Plan
XIII	Amendment of Plan
XIV	Provisions to Prevent Discrimination
XV	Miscellaneous

*The complete plan is contained in the record as an Exhibit to the Stipulation.

CORBETT ENTERPRISES, INC.
RETIREMENT PLAN FOR
PRODUCTION EMPLOYEES

Corbett Enterprises, Inc., on behalf of itself and as agent for those domestic corporations in which Corbett Enterprises, Inc. owns directly or indirectly 51% or more of the voting stock and which with the approval of Corbett Enterprises, Inc. elect to adopt the pension plan set forth herein, hereinafter called the "Affiliated Companies",

WITNESSETH:

WHEREAS, by document adopted and effective February 5, 1972, Corbett Enterprises, Inc. adopted the Corbett Enterprises, Inc. Retirement Plan for Production Employees, and

WHEREAS, it is the desire of the Affiliated Companies to amend and restate in its entirety the retirement plan for their Production employees.

NOW THEREFORE, it is agreed by the Affiliated Companies that as of February 5, 1976 the Corbett Enterprises, Inc. Retirement Plan for Production Employees shall be as follows:

ARTICLE I

Definitions

* * * * *

1.3 The "Affiliated Companies" are Corbett Enterprises, Inc., and those corporations in which Corbett Enterprises, Inc. owns directly or indirectly 51% or more of

the voting stock and which with the approval of Corbett Enterprises, Inc. shall be listed in the Appendix of this Plan. The continuance of the Plan shall not be affected by the dissolution of any of the Affiliated Companies other than Corbett Enterprises, Inc.

* * * * *

1.11 "Credited Interest" means interest, compounded annually, at the rate of 3-1/2% per annum prior to February 5, 1976, and at the rate of 5% per annum after February 4, 1976 credited to a Participant's contributions for the period beginning with the January 1st following the date each contribution was made and ending on the first to occur of the following dates:

(a) The first day of the month in which a refund is made to the Participant or his Beneficiary, and

(b) The date retirement income payments commence to the Participant.

The applicable rate of Credited Interest is subject to adjustment from time to time pursuant to Section 411 (c)(2)(D) of the Internal Revenue Code in accordance with Treasury Department Regulations.

* * * * *

1.23 "Plan" means the description of the benefits of the Participants, Pensioners, Beneficiaries, or Contingent Survivors, the determination of the eligibility for such benefits and the rights and liabilities of Affiliated Companies, the Trustee or Insurance Company, as set forth herein, known as the Corbett Enterprises, Inc. Re-

tirement Plan for Production Employees. The "noncontributory portion" of the Plan refers to the benefits provided to Participants, Pensioners, Beneficiaries or Contingent Survivors irrespective of whether the Employee has elected to make the contributions provided in Section 3.1. The "contributory portion" of the Plan refers to the additional benefits provided as a result of the receipt by the Affiliated Company of the Employee's contributions.

* * * * *

ARTICLE II

Eligibility

2.1 Each employee shall be eligible for participation, beginning with the first day of the month coinciding with or following the first to occur of (a) the end of the one year period commencing with the day of such Employee's first Hour of Service, or any Plan Year commencing subsequent thereto, during which one year period or subsequent Plan Year such Employee first completes five hundred (500) Hours of Service or (b) the attaining of age 45 by such Employee.

2.2 All Employees described in Section 2.1 shall be automatically enrolled in the Plan coincident with the beginning of eligibility with respect to the non-contributory portion of the Plan. In order to participate in the contributory portion of the Plan, an eligible Employee must execute a membership card electing to contribute, but no benefit shall accrue to the credit of such Participant under the contributory portion of the Plan for services rendered prior to the first day of the month coinciding with

or next following the execution by such Participant of such membership card. If an Employee does not elect to contribute when first eligible to do so, he must execute a waiver card, but his failure to do so shall not be evidence of an election to contribute.

* * * * *

2.4 A Participant shall continue as such only while he is an Employee and does not incur a Break in Service. Upon reemployment, a former Participant who had satisfied the vesting requirements of Section 6.4 shall immediately resume participation and a former Participant who had not satisfied those vesting requirements must again satisfy the eligibility requirement of Section 2.1.

ARTICLE III

Contributions

3.1 A Participant may elect from time to time to contribute 5% of his Annual Earnings for the preceding Plan Year between $6,000 and $20,000. If the Participant worked less than a full twelve (12) months during the preceding Plan Year, his Annual Earnings for that Year shall be determined by annualizing his total compensation paid during such Year. In the case of a Participant who earned no compensation during the preceding Plan Year, his Annual Earnings for the preceding Plan Year shall be assumed to be his annualized total compensation paid for the first full calendar month of the current Plan Year while employed by any of the affiliated Companies.

* * * * *

3.3 During the continuance of this Plan, each Affiliated Company shall pay the remaining costs of this Plan with respect to the Employees of such Affiliated Company. Such payments shall be made by the Affiliated Company concerned either to the Trustee or to the Insurance Company in such amounts and at such times as may be determined by agreement between the Insurance Company and the Pension Committee, or by the Trustee and the Pension Committee, respectively. Payments to the Insurance Company and the Trustee shall be in such aggregate amount as the Affiliated Company shall consider necessary, on the basis of actuarial calculations and recommendation, to fund the benefits of the Plan in accordance with law.

* * * * *

3.5 A Participant may elect to withdraw his voluntary contributions plus Credited Interest at any time by written request to his Pension Representative. Upon such withdrawal, a Participant who has not fulfilled the vesting requirements of Section 6.4 shall forfeit all Contributory Benefits under the Plan. Upon such withdrawal, the accrued benefit of any Participant who has fulfilled such vesting requirements shall be actuarially reduced by the amount of such withdrawal. A Participant having made such a withdrawal may, at any time prior to his termination of employment with the Affiliated Company repay to the Plan the amount of any such withdrawal or withdrawals together with Credited Interest from the date of such withdrawal or withdrawals to the date of repayment, in which event all accrued benefits forfeited by reason of such withdrawal or withdrawals shall be restored to such Participant.

ARTICLE IV

Retirement Benefit

4.1 Annual retirement income benefits provided by this Section 4.1 are provided on the basis of monthly payments continuing for the life of the Participant with five years of payments guaranteed. Where benefits take another form, as in the case of a married Participant or a Participant electing an optional form of benefits, the actual amount of the monthly payment will differ from that determined under this Section 4.1.

(a) For each Year (adjusted for completed Months in the case of service prior to February 5, 1976 and any short Plan Year) of Service completed subsequent to February 5, 1972 while a Participant in this Plan, a Participant shall be credited with an annual retirement income commencing at Normal Retirement Date equal to 1-1/4% of the first \$6,000 of his Annual Earnings plus, if he makes the permitted contributions as set forth in Section 3.1 hereof, 1-3/4% of the next \$14,000 of his Annual Earnings and 1-1/4% of his Annual Earnings in excess of \$20,000.

* * * * *

4.2 Except as herein provided, a Participant shall retire on his Normal Retirement Date. The retirement benefits herein provided shall be paid to the Pensioners Beneficiaries or Contingent Survivors out of the Plan Assets by the Insurance Company pursuant to the Contract or by the Trustee pursuant to the trust agreement. Upon retirement, a Participant shall receive a certificate stating the total benefits to be paid to him and benefits

if any, to be paid to a Beneficiary or Contingent Survivor.

4.3 A Participant may retire as of an Early Retirement Date, if he has completed at least two years of Continuous Service by such Date, and may elect to have retirement income payments begin on his Early Retirement Date. In such event, retirement income shall be equal to the retirement income the Participant has accrued as of his Early Retirement Date under Section 4.1, reduced by five-twelfths of 1% for each month by which the Participant's Early Retirement Date precedes his Normal Retirement Date. At the timely request of such Participant, prior to his elected Early Retirement Date, payments hereunder may be increased in the period prior to his attainment of age sixty-two and reduced thereafter so that the monthly payment hereunder before attainment of age sixty-two shall approximately equal to the total of (a) the reduced monthly payments after attainment of age sixty-two and (b) the monthly Primary Social Security benefits to which such Participant will become entitled upon attainment of age sixty-two (62). With the consent of his Pension Representative, a Participant by written notice received by the Pension Representative at least one month but not more than twelve months before his Early Retirement Date may elect one of the three forms of retirement income as provided in Section 4.10 to be effective on his Early Retirement Date.

4.4 With the permission of the Affiliated Company concerned, acting through its Board of Directors or in such other manner as may from time to time be determined by such Board of Directors, a Participant may postpone

his retirement date and remain in the employ of the Affiliated Company concerned after his Normal Retirement Date. During the continuance of his Service after Normal Retirement Date, such Participant shall continue in all respects as a Participant, accruing benefits under the Plan in accordance with its terms until his actual retirement.

4.5 Retirement income shall be payable in monthly amounts, each being 1/12 of the annual amount as herein provided, for the remaining lifetime of the Pensioner. The first payment shall be paid, on that first day of a month which is the Actual Retirement Date of the Pensioner, and the monthly payments shall be on the first day of each month thereafter. No such payment to a Pensioner shall be made after his death; and if a Pensioner dies on the first day of a month, the payment due on such day shall be paid to the Beneficiary of the Pensioner.

4.6 The amount of benefits to which a Participant is entitled under the Plan upon his retirement is stated in Section 4.1 as a life annuity with five years' payments guaranteed. The amount of benefits payable to a Pensioner, Surviving Spouse, Contingent Survivor or Beneficiary shall in each case be computed as the product of (a) the benefit determined under Section 4.1 multiplied by (b) the actuarial factor or factors, based on the reasonable actuarial assumptions of the Plan, appropriate for the applicable form of benefit. The benefit provided to a Participant shall, at his Early Retirement Date, be the actuarial equivalent of the benefit to which he is entitled under Section 4.1. The benefit provided to a Par-

ticipant shall, at his Postponed Retirement Date, be the benefit to which he is entitled under Section 4.1 determined to the date of his Actual Retirement without further adjustment on account of the deferral of benefits earned to his Normal Retirement Date.

4.7 (a) If, as of his Actual Retirement Date, the Participant has a spouse, unless such Participant elects as herein provided to receive his benefits in some other form, his retirement income shall be paid to him during his lifetime, and if such spouse survives him shall, following his death continue to be paid to such spouse during the time she survives such Participant at 50% of the amount payable during the life of the Participant.

(b) If a Participant, who had not elected to take his retirement benefits in some other form and who continued in the service of any Affiliated Company after his Normal Retirement Date, should die before his Actual Retirement Date it shall be assumed that he had elected to retire as of the day preceding his death and the survivors' annuity provided in subsection (a) of this Section 4.7 shall be payable for the lifetime of his surviving spouse subject to the other provisions of this Section.

(c) If a Participant who has a spouse elects as herein provided not to take his retirement benefits in the form provided in (a) above, his retirement benefits will be paid in the form provided in Section 4.8 unless such Participant elects an optional form under Section 4.10.

4.8 If, as of his Actual Retirement Date, the Participant has no spouse, unless such Participant elects as herein provided to receive his benefits in some other form,

his retirement annuity shall be paid in the form of monthly payments for the life of the Participant with five years' payments guaranteed.

4.09 Prior to a Participant's Normal Retirement Date, or his anticipated actual retirement, the Pension Representative shall furnish to him a written description of the amount and form of the retirement benefits to which he is entitled under the Plan and a written notification of his right to elect to take a different form of benefit. Such notification shall provide such Participant a reasonable period of time in which to make any permissible election and inform him of the availability of a written explanation of the terms and conditions of the various other forms of benefit and the financial effect on his retirement income of any election he might be considering. All elections and revocations of elections hereunder shall be in writing on forms to be prescribed by the Pension Representative.

The period for an election by a Participant must be of reasonable duration (not less than 90 days prior to his actual retirement unless the Pension Representative has less notice of a Participant's anticipated actual retirement), the actual election period to be established by the Pension Committee. The description and notification must be given to the Participant prior to or within a reasonable period of time after the commencement of the election period, and any written explanation requested by the Participant must be given within a reasonable period of time after the request. Any election hereunder may be revoked and another election made within the election

period subject to Pension Representative consent in the case of optional forms of benefit provided in Section 4.10.

4.10 In lieu of the normal form of retirement income benefits payable following Actual Retirement Date and the post retirement death benefit payable in accordance with Article V, a Participant may, with the approval of the Pension Representative, elect one of the following three optional forms of retirement income, of actuarially equivalent value to be effective as of his Actual Retirement Date.

OPTION A. An actuarially reduced amount of retirement income payable for the life of the Pensioner, and after his death, either 100%, 66-2/3% or 50% of such actuarially reduced amount, payable to the Contingent Survivor during his lifetime.

* * * * *

OPTION B. An actuarially reduced amount of retirement income payable for the life of the Pensioner, with, provided the Pensioner dies before receiving ten years' payments (120 payments if benefits are payable monthly), payments continuing after his death until an aggregate of ten years' payments have been made either to the Pensioner or the Beneficiary named by him to receive such payments after his death.

* * * * *

OPTION C. An actuarially increased amount of retirement income payable only for the life of the Pensioner with no further payments after such Pensioner's death.

An election of any option, when accepted by the Pension Representative cannot be modified or rescinded without his consent, but subject to such consent the right is reserved to the Participant to modify or rescind the election at any time without the consent of the Contingent Survivor or Beneficiary. If the death of the Participant occurs prior to the date on which the option is to become effective, the option shall be inoperative and the only benefits payable shall be those provided in Sections 5.1 and 5.4.

* * * * *

4.13 If any Participant who has been credited under the provisions of Section 4.1 with retirement income under the contributory portion of the Plan withdraws his contributions and credited interest from the Plan at any time as a result of termination of his employment by the Affiliated Companies,

(a) if such Participant then has less than ten Years of Service, his retirement income shall then consist solely of the accrued benefits under the noncontributory portion of the Plan as provided under Section 4.1; or

(b) if such Participant then has ten or more Years of Service, his retirement income shall then be actuarially reduced in value by the amount of such withdrawal; and in either event

(c) the amount of any accrued benefit relinquished by a Participant by reason of withdrawal of his contributions plus credited interest shall be restored to such Participant forthwith upon his repayment to the Plan of the full amount of such withdrawal plus interest at the same rate as provided in the case of Credited Interest hereunder. Such re-

payment may be made at any time within the two years following resumption by the Participant of active employment by the Affiliated Companies.

4.14 If any benefits payable under the Plan will, if paid in monthly payments, amount to less than $25 per month, such benefits may, on written direction of the Pension Representative, be paid in less frequent installments or in a lump sum of equivalent actuarial value.

4.15 In pursuance of the limitations on benefits provided by Section 415 of the Internal Revenue Code of 1954, the projected annual retirement benefits attributable to contributions by the Affiliated Companies, expressed as a straight life annuity for the life of the Participant without any number of installments certain, may not at any time exceed the lesser of

(a) $75,000 and

(b) 100% of the average of such Participant's Annual Earnings for those three consecutive years of his service in which such Annual Earnings were the greatest, or $10,000 if greater than such average Annual Earnings. The above stated sum of $75,000 and, in the case of a Pensioner, his average Annual Earnings, shall be adjusted annually, in accordance with U.S. Treasury Department regulations, for increases in the cost of living. If the Participant has less than ten (10) Years of Service at retirement, the applicable maximum shall be multiplied by a fraction, of which the numerator is his Service and the denominator is ten.

The foregoing limitation shall be applied during each calendar year, on the assumption that the Participant continues in the employ of the Affiliated Companies until his Normal Retirement Date, that his Annual Earnings

continue until his Normal Retirement Date at the same rate as in such calendar year, and that all other relevant factors used to determine benefits under the Plan remain constant as of such calendar year for all future years.

4.16 If a Participant under the Plan participates in any other defined benefit pension plan maintained by the Affiliated Companies which is a qualified plan under Section 401(a) or Section 404(a)(2) of the 1954 Internal Revenue Code, then the limit determined above shall be reduced by any pension benefit to which he is entitled under such other plan.

4.17 If a Participant under the Plan participates in a defined contribution plan maintained by the Affiliated Companies which is a qualified plan under Section 401(a) or Section 404(a)(2) of the 1954 Internal Revenue Code, then in lieu of the limitations in Sections 4.15 and 4.16 the sum of the fractions described below shall not in the case of such Participant in any calendar year exceed 1.4.

(a) In the case of the plan which is a defined contribution plan, the numerator of the fraction shall be the annual additions to such Participant's account for such year, and the denominator shall be the sum of the maximum amount of annual additions which could have been made to such Participant's account for such year and each prior year.

(b) In the case of the plan which is a defined benefit plan, the numerator of the fraction shall be the projected annual benefit at normal retirement age expressed as a straight life annuity without ancillary benefits of such participant under that plan (determined as of the end of such year) and the denominator of which is the lesser of (i) $75,000 and (ii) such Participant's average rate of annual Compensation for those three consecutive calendar years while a Participant in

which his Compensation was the greatest. If such Participant has less than ten (10) Years of Service, the denominator of this fraction shall be reduced by one-tenth for each full Year of Service less than ten (10).

The amount of $75,000 contained in this Section 4.17 is subject to increase in accordance with regulations of the Secretary of the Treasury to reflect increases in the cost of living. Furthermore, all of the provisions of Sections 4.15, 4.16 and 4.17 shall be interpreted and applied in accordance with Section 415 of the Internal Revenue Code and Regulations thereunder.

4.18 Payment of retirement income benefits to a Participant shall begin not later than 60 days after the end of the plan year in which occurs the latest of the following events:

(a) the attainment by the Participant of age 65,

(b) the 10th anniversary of the Participant's becoming a Participant, or

(c) the date of the Participant's termination of employment by the Affiliated Companies.

If the amount of the payment required to commence on the date above specified cannot be ascertained by such date, a payment retroactive to such date may be made no later than 60 days after the earliest date on which the amount of such payment can be ascertained under the Plan.

ARTICLE V

Death Benefits

5.1 In the event of the death of a Participant prior to his Actual Retirement Date, his Beneficiary will receive

a refund of his contributions, if any, with Credited Interest thereon.

5.2 If a Pensioner should die before he receives five years of retirement income payments (60 payments in the case of monthly benefit payments) and if his surviving spouse, if any, is not entitled to benefits under Section 4.7, and if an election of an option set forth in Section 4.10 of this Plan is not in effect with respect to such Pensioner, then his monthly retirement income payments shall be continued to his Beneficiary until a total of five years of such payments (60 payments in the case of monthly benefit payments) have been made to the Pensioner and his Beneficiary. If any of such five years' payments remain unpaid after the death of both the Pensioner and his Beneficiary, the commuted value of such payments remaining unpaid shall be paid to the estate of the last to die.

* * * * *

5.4 In addition to any death benefits provided in accordance with the preceding sections of Article V, a qualified Participant's surviving spouse shall be eligible for a Surviving Spouse's Benefit commencing on the first of the month next following the date of the Participant's death. A Participant shall be qualified if he met all of the following requirements on the date of his death:

(a) He was actively employed by an Affiliated Company on the date of his death, or was a Disabled Participant under Section 7.1;

(b) He had attained the age of 40 years and completed at least 15 Years of Service; or

He had attained the age of 45 years and completed at least 10 Years of Service; or

He had attained the age of 40 or more years, and had completed 10 or more Years of Service, which age and Years of Service taken together add up to 55 or more.

(c) He had been married to his spouse for at least one year;

(d) He had not reached his Actual Retirement Date.

The monthly amount of the Surviving Spouse's Benefit payable to an eligible widow or widower shall be equal to one-half of the monthly amount of retirement income to which the Participant would have been entitled had he retired on the day before his death without having elected to take his retirement benefit in a form other than that provided in Section 4.7, or $25.00 if greater; provided, however, that in the case of a transferred Employee under Section 15.7 whose surviving spouse is eligible for a Surviving Spouse's Benefits under the Corbett Enterprises, Inc. Retirement Plan for Sales, Administrative and Clerical Employees, such Surviving Spouse's Benefits under that Plan shall be aggregated with such benefit payable under the Plan and the minimum Surviving Spouse's Benefit shall be payable only to the extent required to raise the aggregate Surviving Spouse's Benefit to $25.00 per month. Such Surviving Spouse's Benefit shall be payable monthly to such surviving spouse with the final monthly payment made on the first day of the month immediately preceding or coinciding with the date of his or her death.

ARTICLE VI

Rights of Participants on Termination of Employment Prior to Retirement Date

6.1 A Participant who terminates employment with the Affiliated Companies prior to retirement may re-

quest the return of his contributions, if any, made under the Plan plus Credited Interest thereon. In addition, a Participant who has fulfilled the vesting requirements of Section 6.4 shall be entitled to receive benefits provided under Section 6.3.

6.2 A Participant who does not elect to withdraw his contributions plus Credited Interest under Section 6.1 and who has fulfilled the vesting requirements of Section 6.4 at the time his employment is terminated, shall be entitled to retirement income commencing on his Normal Retirement Date, equal to his retirement benefits accrued to the date of termination of his employment. A Participant who does not elect to withdraw his contributions plus Credited Interest and who has not fulfilled the vesting requirements of Section 6.4 shall be entitled to retirement income at Normal Retirement Date equal in value to the amount of his contributions plus Credited Interest to that Date. A Participant whose employment is terminated may elect to have such retirement income paid in accordance with the terms of Section 4.3 of this Plan commencing on his Early Retirement Date by written notice to the Pension Representative received at least 30 days and no more than 12 months before his Early Retirement Date. If such Participant dies prior to the commencement of monthly retirement income payments to him, then the only right of such Participant and his Beneficiary shall be the right to receive the return of the Participant's contributions to the Plan, if any, plus Credited Interest.

6.3 A Participant who does elect to withdraw his contributions plus Credited Interest under Section 6.1,

but who has fulfilled the vesting requirements of Section 6.4 at the time his employment is terminated, shall be entitled to retirement income, commencing on his Normal Retirement Date, limited to retirement income determined under Section 4.1 up to the date of termination of his employment, actuarially reduced in value by the amount of his contributions plus Credited Interest which has been paid to him. Such former Participant may elect to receive the foregoing benefits commencing on his Early Retirement Date, reduced actuarially as provided in Section 4.3, by a written notice to the Pension Representative received at least 30 days and no more than 12 months before his Early Retirement Date.

6.4 Each Participant shall have fulfilled the vesting requirements for all accrued benefits (a) upon completion of ten Years of Service, (b) upon attainment of age 55 and completion of two Years of Service, or (c) at his Normal Retirement Date or prior attainment of age 65.

6.5 Notwithstanding anything in this Article VI to the contrary, each Participant whose benefits under the Corbett Poultry Products Corporation Employees' Retirement Plan for Certain Acquired Companies were fully vested under such Plan prior to the transfer of that Participant to this Plan but which were not distributed, shall be entitled to receive such fully vested benefits under the terms of this Plan at the time and in the manner provided under the provisions of this Plan.

6.6 A Participant who terminates employment with the Affiliated Companies and withdraws his contributions may at any time before he incurs a Break in Service, repay the amount of contributions so paid to him together with

credited interest in which case he shall forfeit none of his accrued benefit as a result of such withdrawal. A Participant who has satisfied the vesting requirements of Section 6.4, who terminates employment with the Affiliated Companies and who withdraws his contributions made under the Plan plus Credited Interest, may at any time following his resumption of participation under the Plan repay the amount of his contribution so withdrawn plus Credited Interest to the date of such repayment in which case the accrued benefits forfeited by him by reason of such withdrawal shall be restored to him.

* * * * *

ARTICLE VIII

Funding

8.1 The Affiliated Companies will fund their liabilities under this Plan through either group annuity or investment only contracts with one or more Insurance Companies or one or more Trust Funds administered by one or more Trustees pursuant to separate trust agreements entered into with such Trustee or Trustees or both. The Pension Committee shall have full power and authority to determine from time to time the amounts of contributions made on behalf of the Affiliated Companies to be paid to any Trustee or any Insurance Company.

8.2 Any actuarial gain arising from forfeitures shall be applied to reduce Affiliated Company contributions in future years.

8.3 The Plan Assets shall not, prior to full satisfaction of all liabilities under the Plan, be used for any pur-

poses whatsoever other than for the exclusive benefit of the Participants, Pensioners or Beneficiaries or to meet the necessary expenses of the Plan.

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ARTICLE XI

Rights of Affiliated Companies to Terminate or Discontinue

11.1 It is the expectation of the Affiliated Companies that they will continue this Plan and the payment of their contributions hereunder indefinitely, but continuance of this Plan is not assumed as a contractual obligation of the Affiliated Companies; and the right is reserved by each of the Affiliated Companies to terminate this Plan with respect to its employees or to discontinue its contributions hereunder at any time by action of its Board of Directors, notice of which shall be delivered to the Trustee and Insurance Company.

11.2 In the event of termination of the Plan with respect to the employees of an Affiliated Company, or partial termination by such Affiliated Company of the Plan with respect to a group of its employees, or discontinuance by such Affiliated Company of its contributions to the Plan, the accrued benefits of the Participants with respect to whom such termination or discontinuance is effective shall, to the extent funded, become wholly vested and nonforfeitable as of the effective date of such termination or discontinuance. Upon such termination or discontinuance the proportionate interest of the Participants, Pensioners, Beneficiaries and Contingent Survivors affected thereby (such affected persons being hereafter in this Article XI

collectively called "Participants") in the Plan Assets shall be allocated and segregated and thereafter held exclusively for the purpose of providing the benefits of the Plan to such Participants. The determination of such proportionate interest shall be made on the basis of the contributions theretofore made by such Participants and such Affiliated Company, the provisions of this Article and the requirements of applicable law and regulations thereunder. The Plan Assets so allocated and segregated shall thereafter be applied to provide benefits on behalf of such Participants in accordance with Section 11.5 following.

11.3 Upon such termination of the Plan, the assets so allocated and segregated shall be applied (after provision is made for expenses, if any· to provide to the affected Participants retirement income benefits in the following order of priorities, subject to Section 11.4 following:

> First, there shall be allocated an amount necessary to provide retirement income benefits for Participants, who, three years prior to the Plan Termination Date, were either receiving retirement income, or would have been eligible to receive retirement income had they or the Employee from whom their rights derive then retired. (For this purpose "retirement income benefits" means retirement income determined for the person entitled thereto in accordance with provisions of the Plan in effect five years prior to the Plan Termination Date.)

> Second, there shall be allocated an amount necessary to provide all other retirement income benefits guaranteed by the Pension Benefit Guaranty Corporation under Title IV of the Employee Retirement Income Security Act of 1974, determined in accordance with Section 4044 thereof.

> Third, there shall be allocated an amount necessary to provide all other retirement income benefits not guaranteed by the Pension Benefit Guaranty Cor-

poration which vest in each Participant as provided in the Plan, assuming that the Plan Termination Date is his Termination of Employment date.

Fourth, there shall be allocated an amount necessary to provide all other retirement income benefits accrued by Participants as of the Plan Termination Date but not then vested as provided in the Plan.

After the Plan Assets have been withdrawn, allocated and expended in accordance with the preceding terms of this Section 11.3, any amount remaining in the Fund will be returned to the Affiliated Company so terminating the Plan as to its employees.

Notwithstanding the foregoing provisions, the amount of any retirement income benefits otherwise to be provided in accordance with this section will be restricted in accordance with Article XIV of the Plan to any extent required.

The amount necessary to provide the retirement income benefits specified in each of the above categories shall be determined in accordance with annuity purchase rate assumptions recommended by the Actuary in accordance with applicable governmental regulations.

If the assets of the Plan applicable to any of the above categories are insufficient to provide full benefits for all persons in such group, the benefits otherwise payable to such persons shall be reduced proportionately. The allocation of the assets of the Plan shall be calculated in accordance with the above priority categories. No liquidation of assets and payment of benefits (or provision therefor) shall actually be made by the Trustee or Insurance Company until after it is advised by the Pension Committee in writing that applicable requirements, if any, of Federal law governing termination of the Plan have been, or are being, complied with or that appropriate authorizations, waivers, exemptions or variances have been, or are being, obtained.

11.4 Anything to the contrary notwithstanding, upon termination or partial termination of the Plan, the Plan Assets which are attributable to Participant contributions and Credited Interest shall be set aside from the proportionate interest of the affected Participants in the Plan Assets allocated and segregated for them pursuant to Section 11.2, prior to the allocation of Plan Assets pursuant to Section 11.3. Such Plan Assets so set aside shall be allocated to the affected Participants in accordance with the following conditions: Each Participant shall be entitled to the value of his Participant contributions plus Credited Interest, which have not previously been applied on his behalf, as of the date of Plan termination or partial termination. Such amount shall, however, be applied to the extent possible to reduce the assets, which would otherwise be required to purchase such Participant's retirement income pursuant to the terms of Section 11.3. If the value of a Participant's contributions plus credited Interest, which have not previously been applied on his behalf, exceed the assets required to purchase retirement income on such Participant's behalf pursuant to Section 11.3, such excess shall be distributed to the Participant.

• • • • •

ARTICLE XII

Termination of Plan

12.1 This Plan shall terminate on the happening of any of the following events:

(a) The date on which Corbett Enterprises, Inc. is legally adjudicated as bankrupt, or effects a general assignment to or for the benefit of its creditors,

(b) The date on which an Affiliated Company, other than Corbett Enterprises, Inc., is legally adjudicated a bankrupt or effects a general assignment for the benefit of its creditors, but only as to the Employees of such Affiliated Company,

(c) The date specified for termination of the Plan by any Affiliated Company with respect to its Employees, as prescribed in Section 11.1.

(d) As to any Affiliated Company other than Corbett Enterprises, Inc., the date as of which the stock ownership by another Affiliated Company ceases to be at least the percentage set forth in Section 1.3. In such cases the funds allocable to the former subsidiary shall be determined by the actuary and then be distributed to the Beneficiaries, Pensioners, and Participants of the former subsidiary in accordance with Sections 11.2, 11.3 and 11.4 or in such other manner as may be acceptable to the Pension Committee, the former subsidiary, and the Internal Revenue Service.

12.2 In the event of termination of the Plan as to Employees of all or some of the Affiliated Companies as specified in Section 12.1, all Participants benefits shall, to the extent funded, become wholly vested and nonforfeitable, the Plan Assets shall be allocated and segregated among the respective Affiliated Companies' Plan Participants and such Assets shall thereupon be applied to provide benefits all as set forth in Sections 11.2, 11.3 and 11.4.

12.3 Notwithstanding any provisions of this Plan to the contrary, upon termination of the Plan, but only after all liabilities under the Plan shall have been satisfied, the Affiliated Companies shall be entitled to any balance of the net assets of the Trust Fund and/or the Insurance Company contract which shall remain by reason of erroneous actuarial computation during the life of this Plan.

ARTICLE XIII

Amendment of Plan

13.1 Except as herein limited, the Board of Directors shall have the right to amend this Plan at any time to any extent that they may deem advisable. Such amendment shall be stated in an instrument in writing, executed by Corbett Enterprises, Inc. Upon delivery of such instrument to the Trustee or Insurance Company, this Plan shall be deemed to have been amended in the manner therein set forth, and all Participants, Pensioners, Beneficiaries and Contingent Survivors shall be bound thereby, provided, however:

(a) That no amendment shall increase the duties or liabilities of the Pension Committee without the written consent of its members;

(b) That no amendment of the Plan shall be added to the contract without the written consent of the Insurance Company;

(c) That no amendment shall increase the duties and responsibilities of the Trustee without its written consent;

(d) That no amendment shall have the effect of vesting in any or all of the Affiliated Companies any interest in or control over any part of the Plan Assets

prior to termination of the Plan and complete satisfaction of all liabilities under the Plan;

(e) That no amendment shall have any retroactive effect so as to deprive any Participant of any benefit already accrued without his written consent; provided, however, that any amendment may be made retroactively which is necessary to bring this Plan into conformity with governmental regulations or in order to qualify, or continue the qualification of, this Plan and the Trust Fund for tax exemptions or the contributions of the Affiliated Companies to the Fund for a deduction for tax purposes, or which does not decrease the benefits of the participants.

* * * * *

IN WITNESS WHEREOF, the Affiliated Companies have caused these presents to be executed by duly authorized officers of Corbett Enterprises, Inc. and its corporate seal to be hereunto affixed as of the day and year first above written.

[signatures omitted in printing]

APPENDIX A
TO PRODUCTION PLAN

AFFILIATED COMPANIES IN ACCORDANCE WITH SECTION 1.2 OF SUCH PLAN

Chesapeake Foods, Inc.
Chesapeake Growers, Inc.
Fort Halifax Packing Company
Fort Halifax Poultry Company
McElrath Poultry Company

EFFECTIVE ON AND AFTER JANUARY 1, 1973, THE FOLLOWING ADDITIONAL AFFILIATED COMPANIES:

Bronson Farms, Inc.
Corbett Brothers

EFFECTIVE ON AND AFTER JANUARY 1, 1974, THE FOLLOWING ADDITIONAL AFFILIATED COMPANIES:

Arpac Poultry, Inc.
Arpac, Inc.
National Egg Products Corporation
Eggland, Inc.
Farm Fresh Eggs, Inc.

EFFECTIVE ON AND AFTER FEBRUARY 24, 1974, THE FOLLOWING ADDITIONAL AFFILIATED COMPANY:

McElrath Farms, Inc.

EFFECTIVE ON AND AFTER JANUARY 1, 1975, THE FOLLOWING ADDITIONAL AFFILIATED COMPANY:

Ceres Supply Company

[Exhibits III-VI to the
Stipulation have been omitted
from the Appendix but may be found in the record]

No. 86-341 (8)

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

P. DANIEL COYNE, Director Bureau of Labor Standards, Department of Labor

Appellee

and

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

RAYMOND BOURGOIN, *et al.*

Appellees

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR APPELLANT

JOHN C. YAVIS, JR.
(*Counsel of Record*)

THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone (203) 240-6000

Appellant's Attorneys

32 pp

Questions Presented

1. Whether The Employee Retirement Income Security Act Of 1974, 29 U.S.C. § 1001 *Et Seq.*, Which Explicitly Supersedes "Any And All State Laws Insofar As They May . . . Relate To Any Employee Benefit Plan", Preempts A State Statute Requiring An Employer To Establish An Employee Severance Pay Plan With Benefits Either Determined By Contract Or By That Statute.

2. Whether The National Labor Relations Act, 29 U.S.C. § 141 *Et Seq.*, Preempts A State Statute That Discriminates Against Unionized Employers i) By Compelling Them To Reach An Agreement On A Mandatory Subject Of Bargaining (Severance Pay) Or Incur Specified Liability And ii) By Allowing Non-union Employers Unilaterally To Avoid The Specified Liability.

Parties to the Proceeding

The parties to the proceeding below were as follows:

Plaintiff-Appellees:

Director of Bureau of Labor Standards (State of Maine);
Raymond Bourgoin; Clarence Hachey; Reginald Pooler; Audrey Tyler; Dorothy Dyer; Debbie LaMontagne; Lawrence Belanger; Raymond Caouette; Alice Gurney; Bertha Knowles; Eugene Bourgoin

Defendant-Appellant:

Fort Halifax Packing Company[1]

Amicus Curiae:

Chamber of Commerce of the United States of America; Maine Chamber of Commerce and Industry

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[1]In accordance with Rule 28.1 of the Rules of this Court, Fort Halifax Packing Company, a Maine corporation, states that from June 24, 1986 to September 29, 1986 it was a wholly-owned subsidiary of Corbett Enterprises, Inc., a Delaware corporation with its executive offices in West Hartford, Connecticut ("Corbett Delaware"). From 1972 to June 24, 1986, Fort Halifax Packing Company was a wholly-owned subsidiary of Corbett Enterprises, Inc., a Missouri corporation ("Corbett Missouri"), whose executive offices were also in West Hartford, Connecticut. On June 24, 1986, in a statutory merger under the laws of Delaware and Missouri, Corbett Missouri was merged into Corbett Delaware, with the Delaware corporation as the surviving corporation. Corbett Poultry, Inc., a Delaware corporation, is also a wholly-owned subsidiary of Corbett Enterprises, Inc. On September 29, 1986, Hudson Foods, Inc., a Delaware corporation with a Rogers, Arkansas headquarters, purchased all of the outstanding and issued stock of Fort Halifax Packing Company's parent, Corbett Delaware.

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TABLE OF AUTHORITIES

U.S. Constitution and Statutes:

Other Authorities:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
No. 86-341

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

P. DANIEL COYNE, Director Bureau of Labor Standards, Department of Labor,
Appellee,

and

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

RAYMOND BOURGOIN, ET AL.,
Appellees.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Maine Supreme Judicial Court, entitled *Director of Bureau of Labor Standards, et al.* v. *Fort Halifax Packing Company*, appellant's Jurisdictional Statement Appendix (hereinafter cited as "J.S. App.") A, is reported at 510 A.2d 1054 (Me. 1986). The opinions of the Maine Superior Court after trial and granting partial summary judgment, J.S. App. B and C respectively, are not reported.

Jurisdiction

The Maine Supreme Judicial Court entered judgment on June 2, 1986. The appellant filed a Notice of Appeal with the Clerk of the Maine Supreme Judicial Court and simultaneously filed a copy with the Clerk of the Maine Superior Court, Kennebec County, on August 4, 1986 (J.S. App. D). On August 29, 1986, the appellant docketed this appeal. On November 10, 1986, this Court noted probable jurisdiction. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved

Article VI, United States Constitution:

. . . The laws of the United States . . . shall be the supreme Law of the Land . . .

Statutes:

Section 625-B Title 26 of the Maine Revised Statutes Annotated and the relevant portions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, and of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, are reprinted in J.S. App. E.

Statement of the Case

From 1952 through 1981, Fort Halifax Packing Company ("Fort Halifax") and predecessor companies operated a poultry processing and packaging plant in Winslow, Maine. Corbett Enterprises, Inc., a multi-state poultry producer, acquired all of the assets of Fort Halifax in 1972. Almost all of Fort Halifax's approximately 125 employees were represented by Local 385 of the Amalgamated Meat Cutters & Butcher Workmen of North America. The union employees were covered by a

series of collective bargaining agreements and participated in the "Corbett Enterprises, Inc. Retirement Plan For Production Employees." Administrative and clerical employees not covered by the collective bargaining agreement participated in the "Corbett Enterprises, Inc. Retirement Plan for Sales, Administrative and Clerical Employees." Both plans uniformly covered employees in eleven states.

On May 21, 1981, because of adverse market conditions, Fort Halifax laid off most of its employees. Pursuant to the Retirement Plans, employees became eligible for immediate vesting and distribution of plan assets.

On October 30, 1981, eleven employees filed suit against Fort Halifax in Maine Superior Court seeking severance payments under 26 M.R.S.A. § 625-B (J.S. App. E). On November 2, 1981, the Director of the Bureau of Labor Standards of the Maine Department of Labor also commenced suit under 26 M.R.S.A. § 625-B. The latter action subsumed the individual plaintiffs' action. *See* 26 M.R.S.A. § 625-B(5).

Section 625-B requires certain employers that have shut down or relocated their operations to pay their former employees severance pay at the rate of one week's pay per year of employment unless: i) the relocation or termination results from natural calamity; ii) *the employee is covered by an express contract providing severance pay;* iii) the employee accepts employment at the relocation site; or, iv) the employee has been employed for less than three years.

Fort Halifax answered the complaints and asserted as defenses, *inter alia,* that the Maine statute was preempted by Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq. See* J.S. App. F at ¶24, A71 and ¶33, A77. The Maine Superior Court rejected Fort Halifax's federal preemption defenses and

entered judgment against it. (*See* J.S. App. C at A36, A42; J.S. App. B at A23, A26).

On appeal to the Maine Supreme Judicial Court, Fort Halifax argued, *inter alia,* that the Superior Court erred in holding that Section 625-B was not preempted by ERISA and the NLRA. In an opinion issued on June 2, 1986, the Supreme Judicial Court rejected these claims.

In considering Fort Halifax's claim that ERISA preempts the Maine severance pay statute, the Supreme Judicial Court explicitly recognized that ERISA Section 514(a) preempts any state law that "relates to" an employee benefit plan. *See* J.S. App. A at A6-A7. It also recognized that this Court has given the phrase "relate to" a "rather broad construction." *Id.* However, it held that Section 514 did not preempt Section 625-B on the theory that the severance pay liability thereunder was established by state law rather than by a private, voluntary employer plan. The Maine Supreme Judicial Court stated:

> In this case the severance pay liability created by Section 625-B is not a plan created by an employer or employee organization. Instead, it is a state created fringe benefit passed within the police power for the purpose of dealing with the economic dislocation that accompanies the shutdown of large establishments. Inasmuch as Section 625-B does not implicate a plan created by an employer or employee organization, it cannot be said to be preempted by ERISA.

Id. at A8.

The Supreme Judicial Court also rejected Fort Halifax's claim that Section 625-B interferes with the collective bargaining process and is preempted by the NLRA. The Court stated:

> Although Section 625-B does affect the collective bargaining relationship by encouraging employers to either agree to some form of severance pay contract or face liability under the act, it does not limit the rights of self-organization or forms of collective bargaining protected by the NLRA and is not preempted by the act.

Id. at A12.

On August 29, 1986, Fort Halifax docketed its appeal from the Maine Supreme Judicial Court, and on November 10, 1986, this Court noted probable jurisdiction.

Summary of Argument

Both the Employee Retirement Income Security Act ("ERISA") and the National Labor Relations Act ("NLRA") preempt the Maine statute.

ERISA. ERISA Section 514, 29 U.S.C. § 1144, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]". Severance pay is an employee benefit within ERISA's scope. *See, e.g., Holland* v. *Burlington Industries, Inc.,* 772 F.2d 1140, 1146 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.,* 106 S. Ct. 3267 (1986); *Gilbert* v. *Burlington Industries,* 765 F.2d 320 (2d Cir. 1985), *aff'd mem.,* 106 S. Ct. 3267 (1986). The states may no more require employers to pay severance benefits than they could require them to pay pension benefits. Yet, that is what the Maine statute seeks to do. By mandating that employers maintain a severance pay plan providing benefits in accordance with the statutory formula or an express contract, Maine impinges on an area of exclusive federal concern.

ERISA not only preempts state laws requiring employee benefit plans, it preempts any state law having "a connection with or reference to" ERISA benefit plans. *Shaw* v. *Delta Air Lines, Inc.,* 463 U.S. 85, 97-98 (1983). The Maine statute bears

the necessary connection or relationship to ERISA benefit plans because statutory liability may be avoided only if the employer adopts a private plan. The relationship between the Maine statute and private plans could not be more direct.

Nothing in ERISA mandates that employers provide any particular benefit. *Shaw,* 463 U.S. at 91. Congress left that decision for private agreement. The Maine statute contravenes this intent by dictating that designated Maine employers make severance payments.

If the holding of the Maine Supreme Judicial Court is affirmed, states will be free to dictate any ERISA benefit. This result would undermine Congress's intent that the grant of such employee benefits be a matter of private choice within a framework of uniform and exclusive federal regulation.

NLRA. The Maine severance pay statute also interferes with free collective bargaining, which is the "cornerstone" of the NLRA. *Golden State Transit Corp.* v. *Los Angeles,* 106 S. Ct. 1395, 1401 (interim ed. 1986). Congress intentionally left certain aspects of the bargaining process " 'to be controlled by the free play of economic forces.' " *Golden State,* 106 S. Ct. at 1398 (quoting *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132, 140 (1976)). The NLRA preempts state regulation of "conduct that Congress intended to be unregulated." *Golden State,* 106 S. Ct. at 1398 (quoting *Metropolitan Life Insurance Company* v. *Massachusetts,* 471 U.S. 724, 105 S. Ct. 2380, 2394 (1985)).

Severance pay is a mandatory subject of bargaining under the NLRA, and as such the parties must negotiate severance pay issues in good faith. They are not, however, bound to agree on severance pay. *See* 29 U.S.C. § 158(d). In fact, an employer is free under federal law to refuse to provide severance pay or to unilaterally institute a severance pay plan at

whatever benefit level it has proposed prior to bargaining impasse. This is not the case, however, under the Maine statute. A union employer in Maine can avoid paying the statutory benefits only if the union agrees. Consequently, the statute enhances the union's collective bargaining power while depriving the employer of its federally protected self-help remedy to unilaterally implement its proposal after impasse. It is precisely in these circumstances, where states attempt to regulate "conduct that . . . remain[s] a part of the self-help remedies left to the combatants in labor disputes," that the NLRA preempts state laws. *Belknap, Inc.* v. *Hale,* 463 U.S. 491, 499 (1983).

The Maine severance pay statute is not saved from NLRA preemption as a minimum benefit statute or as one regulating an area such as insurance reserved to the states. *Cf. Metropolitan Life Insurance Company* v. *Massachusetts,* 471 U.S. 724, 105 S. Ct. 2380 (1985). In *Metropolitan,* the minimum insurance benefit affected union and nonunion employers equally. In contrast, Maine permits an employer to provide less than the statutory severance benefit, or even no benefit at all according to the Maine Attorney General (Appellee's Motion to Dismiss or Affirm at 8 n.5); but the union employer may do so only with the union's agreement, while a nonunion employer is free to do so unilaterally.

If sustained, the Maine statute would be a roadmap for the states to augment a union's bargaining power on mandatory subjects of bargaining and restrict an employer's use of legitimate economic self-help remedies. This result would frustrate Congress's intent to allow the free play of economic forces to mold the substantive terms of collective bargaining agreements. The states may not intrude on the collective bargaining process by enforcing statutes that fail to provide a minimum benefit to all employees in their individual capacities. *Cf. Metropolitan* at 2398-99.

ARGUMENT

I. ERISA Preempts the Maine Severance Pay Statute.

A. Congress Sought to Occupy The Field of Employee Benefit Plans.

The Employee Retirement Income Security Act ("ERISA") preempts the Maine severance pay statute. Section 514 of ERISA, 29 U.S.C. § 1144, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." Section 514 has been referred to as the "'most sweeping Federal preemption [provision] ever enacted by Congress.'" *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1146 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S. Ct. 3267 (1986), (citation omitted). It is a "virtually unique preemption provision." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). By enacting ERISA, Congress "aimed to occupy fully the field of employee benefit plans and to establish it 'as exclusively a federal concern.'" *Gilbert* v. *Burlington Industries*, 765 F.2d 320, 326 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) (quoting) *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Congress's goal was to create uniformity in benefit laws and to prevent inconsistent or conflicting state regulation of employee benefit plans. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98-99 (1983); *Holland*, 772 F.2d at 1147.

In *Shaw* v. *Delta Air Lines, Inc.*, 465 U.S. 85, 98-100 (1983), this Court construed the reach of ERISA preemption broadly. In doing so, the Court relied on the legislative history to Section 514. Initially, the House and Senate each passed preemption provisions that were substantially narrower than Section 514(a); under these provisions a state law would have been preempted only if it related to subjects actually regulated by the federal statute. *See Shaw*, 463 U.S. at 98 n. 18. However, "[t]he Conference Committee rejected these provisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language." *Id.* (citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5162).

As recounted in *Shaw*, statements by the conferees during the subsequent debates stressed the breadth of federal preemption. *Id.* at 98-99. For example, Representative Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, explained:

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the *sole power* to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense *to foreclose any non-Federal regulation of employee benefits plans*. Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State . . . which would affect any employee benefit plan. . . .

120 Cong. Rec. 29197 (1974) (emphasis added). *See Shaw*, 463 U.S. at 99. Likewise, Senator Williams, Chairman of the Senate Committee of Labor and Public Welfare, stated:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefits plans. This principle is intended to apply in its broadest sense to all actions of State or local

governments, or any instrumentality thereof, which have the force or effect of law.

120 Cong. Rec. at 29933, *quoted in Shaw*, 463 U.S. at 99.

Thus, in enacting Section 514(a), Congress consciously decided to preempt not only "those state laws relating to subjects covered by ERISA", but also any "state laws relating to benefit plans". *Shaw*, 463 U.S. at 98 n.19. In doing so, the conferees flatly rejected the view that the preemption provisions of the House and Senate bills were "too broad" and instead expanded ERISA's preemptive reach. *Id.* at 98. Senator Javits stated that the conferees rejected both the House and Senate versions because of: i) the spectre of "endless litigation over the validity of State action that might impinge on Federal regulation" and ii) the fear of "multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29942 (1974), *quoted in Shaw*, 463 U.S. at 99 n.20. Because of the "pervasive Federal interest" and the interest in national uniformity, Congress intended "the displacement of State action in the field of private employee benefit plans." *Id.*

Besides *Shaw*, the Court has addressed ERISA's preemption clause on two other occasions. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), the Court held that by enacting ERISA's broad preemption clause, Congress "meant to establish pension plan regulation as exclusively a federal concern." The Court emphasized that "even *indirect* state action bearing on private pensions may encroach upon the area of exclusive federal concern." 451 U.S. at 525 (emphasis added). The Court did note, however, that the scope of federal concern did not reach areas expressly preserved for state regulation, such as insurance, 451 U.S. at 522 n.19. Accordingly, in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985), while upholding a Massachusetts insurance statute, the Court reaffirmed the breadth and vitality of ERISA

preemption by stating Section 514 "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan*, 105 S. Ct. at 2389.

After *Alessi*, Congress on two occasions has reaffirmed the broad scope of ERISA preemption by making express and specific exceptions in situations deemed by it to be appropriate. Pub. L. 97-473 § 301(a), § 302(b); Pub. L. 98-397. Those amendments added specific exceptions from ERISA preemption for: i) the Hawaii Prepaid Health Care Act; ii) certain insurance standards applicable to multiple employer welfare benefit plans; and iii) qualified domestic relations orders. 29 U.S.C. § 1144(b)(5), (6) and (7). In enacting these amendments, Congress did not limit the expansive judicial construction accorded Section 514. *See, e.g.*, Statement of Representative Erlenborn, 128 Cong. Rec. H9,610 (daily ed. Dec. 13, 1982) ("In agreeing to the Hawaii exception [Congress] will be reaffirming the broad scope of ERISA preemption. . . ."). In the absence of any exception for state-mandated severance pay plans, Congress's intent not to permit state regulation of such plans is manifest.

This intent also may be seen in Congress's 1974 creation of the Joint Pension, Profit-Sharing and Employee Stock Ownership Plan Task Force of Congressional Committees to study and review "the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans." 29 U.S.C. § 1222(a)(5). This Task Force reaffirmed the need for national uniformity as being so great that "enforcement of state regulation should be precluded." *Shaw*, 463 U.S. at 99 n.20.

B. The Maine Severance Pay Statute Mandates An "Employee Benefit Plan."

ERISA defines an employee welfare benefit plan as including

> any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment . . . or (B) any benefit described in section [302 (c) of the Labor Management Relations Act, 29 U.S.C. § 186(c)].

29 U.S.C. § 1002(1). Section 302(c)(6) of the LMRA includes "severance, or similar benefits" and thus places severance pay plans squarely within the definition of employee welfare benefit plans. *Holland* v. *Burlington Industries,* 772 F.2d 1140, 1144 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.,* 106 S.Ct. 3267 (1986); *Gilbert* v. *Burlington Industries, Inc.* 765 F.2d 320, 326 (2d Cir. 1985), *aff'd mem.,* 106 S. Ct. 3267 (1986). The Maine severance pay statute requires that an employer have a severance pay plan. While the employer has the option of i) accepting the statutory terms and conditions or ii) selecting other terms and conditions, either option results in a severance pay plan. *See* J.S. App. E.

For those employers that do not have or do not establish a "voluntary" plan, the Maine severance pay statute specifies the required terms and conditions. The statute: i) requires specified severance benefits to be paid; ii) creates former employees as the class of beneficiaries; iii) identifies the employer's general assets as the source of payment; and iv) establishes a procedure for collecting those benefits. Thus, the statute itself imposes an employee benefit plan upon employers. *See Donovan* v. *Dillingham,* 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*) (a plan exists under ERISA "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for re-

ceiving benefits"). *Accord Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499, 1503-04 (9th Cir. 1985); *Molyneux* v. *Arthur Guinness & Sons,* 616 F. Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.,* 567 F. Supp. 1258, 1267 (N.D. Ala. 1983). Since the very operation of 26 M.R.S.A. § 625-B requires an employer to maintain a "plan", *a fortiori,* the statute "relates to" an employee benefit plan and is preempted by ERISA. ERISA § 514, 29 U.S.C. § 1144.

The Maine Supreme Judicial Court disclaimed ERISA preemption "[b]ecause Maine's severance pay statute is operative only when a privately created employee benefit plan covering severance pay is not in existence." *See* J.S. App. at A8. The Maine court presumed that there is no ERISA "plan" where employee benefits are mandated by state law. However, in *Standard Oil Co. of California* v. *Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981), this Court affirmed the Ninth Circuit's rejection of the same reasoning. There, the plaintiff challenged a state law requiring employers to provide a comprehensive prepaid health care plan to their employees. The State of Hawaii argued that federal preemption did not apply because the term "employee benefit plan" in Section 3 of ERISA, 29 U.S.C. § 1002, did not encompass plans mandated by state law. The Ninth Circuit rejected this argument, stating:

> We cannot agree . . . with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. . . . There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees. . . . The plans *envisioned* under the Hawaii statute are therefore not rendered outside the definition of employee welfare benefit plans *simply because Hawaii has attempted to make them mandatory.*

633 F.2d at 764 (citations omitted) (emphasis added). *Cf. Rebaldo* v. *Cuomo,* 749 F.2d 133, 138 (2d Cir.), *cert. denied,* 105 S. Ct. 2702 (1984) ("It is clear that ERISA preempts state laws that require or forbid the provision of a certain kind of benefit."). Although Congress eventually created a limited exception for the Hawaii Act, 29 U.S.C. § 1144(b)(5), it did not question the result reached by the courts. *See* Statement of Representative Erlenborn, 128 Cong. Rec. H9,610 (daily ed. December 13, 1982) (In enacting the Hawaii exception, Congress reaffirmed "the validity of the interpretation of the Federal courts in connection with the Hawaii statute.") (cited in *Council of Hawaii Hotels* v. *Agsalud,* 594 F. Supp. 449, 455 n.9 (D. Hawaii 1984)).

In *Agsalud,* Standard Oil had challenged the Hawaii statute because it would have imposed additional terms upon the company's existing health care plan. However, the court's ERISA preemption holding was not limited to conflicts between existing health plans and the statutory requirements. The Hawaii statute "envisioned" the establishment of new plans as well, and the court made clear that Hawaii could not require an employer to establish a new plan. 633 F.2d at 764. The Maine statute likewise "envisions" the establishment of severance pay plans, either according to the statutory formula or according to some other formula. Thus, the Maine Supreme Judicial Court's analysis cannot be reconciled with *Agsalud,* and it is *Agsalud* that finds support in the plain language of ERISA.

Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), exempts from ERISA's coverage a "plan . . . maintained solely for the purpose of complying with i) applicable workmen's compensation [laws] or ii) unemployment compensation [laws] or iii) disability insurance laws." These are the only exemptions for state-mandated employee benefits. If Congress had intended a sweeping exemption for all State-mandated employee benefits, Section 4(b)(3)'s specific exemptions for the three listed benefits would be superfluous. *See Pervel Industries, Inc.* v. *State of Connecticut Commission on Human Rights and Opportunities,* 468 F. Supp. 490, 492 (D. Conn. 1978), *aff'd,* 603 F.2d 214 (2d Cir. 1979), *cert. denied,* 444 U.S. 1031 (1980) (Congress need not "identify the several categories of state law it wishes to preempt"; only those laws expressly saved are exempt from ERISA preemption). As it did in *Metropolitan,* this Court should reject a construction that would render ERISA provisions "unnecessary" or "redundant". 105 S. Ct. at 2390. Instead, the Court may give effect to Section 4(b)(3) by holding, as in *Agsalud,* that the "plans envisioned under the [Maine] statute" are ERISA employee benefit plans. 633 F.2d at 764.

C. The Maine Severance Pay Statute Relates To Existing and Envisioned Employee Benefit Plans.

Section 514 preempts state laws that "relate to *any* employee benefit plan." (Emphasis added.) In *Shaw* v. *Delta Air Lines,* 463 U.S. 85 (1983), the Court construed the phrase "relate to" broadly, holding that "[a] law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 97-98. In arriving at this conclusion the Court quoted Black's Law Dictionary's definition:

> Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.

Id. at 97 n.16 (quoting Black's Law Dictionary 1158 (5th Ed. 1979)). In light of *Alessi, Shaw,* and *Metropolitan,* it is beyond dispute that ERISA preempts the Maine severance pay statute if that statute "relates to" employee benefit plans.

The Maine statute on its face relates to existing plans in at least two ways. First, the statute's applicability is measured directly against the existence of a private plan: only employers that have established their own severance pay formula

may avoid the statutory formula. Second, an employer with its own plan may not eliminate that plan without incurring liability under the statute.

Moreover, the Maine severance pay statute would be preempted under the "relate to" test even if no Maine employer had an existing severance pay plan. Because it "envisions" the creation of severance pay plans through private contract as an alternative to statutory liability, the statute relates to private plans that will be created to avoid statutory liability.

In sum, the Maine statute has an explicit and direct relationship with both established and envisioned ERISA plans. One could hardly posit a statute with a clearer "connection with or reference to" employee benefit plans.

D. The State of Maine May Not Require What Congress Left for Private Choice.

ERISA also preempts the Maine law because it mandates the provision of an ERISA benefit. Such mandated benefit statutes contravene Congress's intent that neither it nor the states should be involved in the business of dictating plan benefits.

In adopting ERISA Congress sought to avoid abuses in employee pension plans. It did so by enacting detailed provisions concerning pension vesting and funding, plan termination insurance, plan disclosure, fiduciary responsibility and portability of benefits. By these means, Congress sought to ensure that earned pension benefits would actually be realized. *See, e.g.*, 120 Cong. Rec. 29192 (1974) (remarks of Rep. Perkins); *id.* at 29944 (remarks of Sen. Javits). In enacting this "comprehensive and reticulated" statute (*Alessi*, 451 U.S. at 510), however, Congress did not require employers to maintain employee benefit plans, nor did it prescribe the type or level of benefits to be provided. The decision as to which employee benefit plans an employer would provide and their substantive content was

left completely to the private parties. In doing so, Congress was aware that benefits were often traded off against one another or against current compensation. *Cf.* H. R. Rep. No. 807, 93d Cong., 2d Sess. 48-49, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4714.

In *Alessi*, this Court recognized that employers are free *not* to provide ERISA-covered benefits, stating that "ERISA leaves this question largely to the private parties creating the plan." 451 U.S. at 511. In the Court's words, "the private parties, not the Government, control the level of benefits. . . ." *Id.* Similarly, in *Shaw* this Court stated that "ERISA does not mandate that employers provide any particular benefits." 463 U.S. at 91. *See also Moore* v. *Reynolds Metals Company Retirement Program for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) ("[A]n employer has no affirmative duty to provide employees with a pension plan. In enacting ERISA, Congress continued its reliance on *voluntary* action by employers.") (emphasis in original, citation omitted); *Sutton* v. *Weirton Steel Division of National Steel Corporation, et al.*, 567 F. Supp. 1184, 1195 (N.D. W. Va. 1983), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) ("ERISA does not require an employer to offer any type of benefit. . . .").

The State of Maine obviously disputes Congress's decision to leave the provision of benefits in the hands of private parties. Maine prefers a system that makes at least one of these benefits, severance pay, mandatory. However, Maine may not step into the severance pay area and mandate that which Congress left voluntary. Indeed, it defies logic to assume that Congress intended to prohibit the states from regulating employee benefit plans in any manner whatsoever but to allow them to require the payment of ERISA benefits.

II. The NLRA Preempts the Maine Severance Pay Statute.

The NLRA provides that the bargaining obligation "does not compel either party to agree to a proposal." *See* Section 8(d), 29 U.S.C. § 158(d). In construing Section 8(d), this Court has stated time and again over several decades that Congress intended employers and unions to negotiate in a generally unregulated atmosphere. *See, e.g., Golden State Transit*, 106 S. Ct. at 1400; *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *Local 24 of the International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 293 (1959). This Court has elaborated:

> [T]he fundamental premise on which the act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Porter, 397 U.S. at 108. *See Teamsters*, 358 U.S. at 296 (States may not limit "the solutions that the parties' agreement can provide to the problems of wages and working conditions."). *Accord Golden State Transit*, 106 S. Ct. at 1401 ("Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations."); *Machinists*, 427 U.S. at 140, 148-151 (The parties' agreement should be controlled only by the "free play of economic forces."); *NLRB* v. *Insurance Agents International Union AFL-CIO*, 361 U.S. 477, 488 (1960) (Apart from their duty to bargain in good faith, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any government power to regulate the substantive solution of their differences."). Recently, this Court restated the NLRA limitation upon the police power of the states:

> The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

Metropolitan, 105 S. Ct. at 2395 (citations omitted).

Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); C. Morris, The Developing Labor Law 773-74 (2d ed. 1983); *Advice Memoranda of NLRB General Counsel*, Case No. 25-CA-15237, June 30, 1983, *reprinted in* 113 LRRM (BNA) 1103, 1104. Accordingly, labor and management are bound to negotiate in good faith concerning severance pay issues. In the event that the parties are unable to agree, each party may use economic self-help to advance its bargaining position. *Machinists*, 427 U.S. at 146-47.

Normally, an employer's self-help remedies would include a lock-out, refusal to concede on issues in order to end a strike, temporary or permanent replacement of economic strikers, or institution of unilateral changes in terms and conditions of employment. *See, e.g., American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 313, 316 (1965). Resort to these measures "is part and parcel of the process of collective bargaining." *Machinists*, 427 U.S. at 149 (quoting *Insurance Agents*, 361 U.S. at 495). Allowing their "use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Machinists*, 427 U.S. at 146 (quoting *Teamsters* v. *Morton*, 377 U.S. 252, 258 (1964)). As restated in *Golden State*, states may not restrict these self-help remedies "unless such restrictions presumably were contemplated by Congress." 106 S. Ct. at 1399.

The Maine Supreme Judicial Court recognized that the Maine statute "affect[s] the collective bargaining relationship by encouraging employers to either agree to some form of severance pay contract or face liability under the act." J.S. App. A at A12. Nonetheless, it upheld the statute by relying on this Court's decision in *Metropolitan*. This reliance was misplaced.

Metropolitan involved a Massachusetts statue requiring *insurers* (not employers) to provide minimum mental-health care benefits in general insurance policies. As noted by this Court, the *Metropolitan* appellants did not even suggest that the statute operated to alter "the balance of power between the parties to the labor contract". 105 S. Ct. at 2395. Rather, the appellants attempted to expand NLRA preemption principles by arguing that Congress

> intended to prevent the States from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law.

Id. at 2395. This Court disagreed, stating that the NLRA is concerned with the "equitable process for determining terms and conditions of employment". *Id.* at 2396. The substantive terms themselves do not implicate NLRA preemption "when the parties are negotiating from relatively equal positions". *Id.*

Stressing the absence of conflict between federal labor policy aimed at maintaining "the equality of bargaining power" and a state statute imposing "*minimal substantive requirements*", this Court upheld the Massachusetts statute. *Id.* at 2397 (emphasis supplied). However, the Court made clear that its holding rested upon two critical criteria:

1. That the "minimum standards" neither encouraged nor discouraged the collective bargaining process; and,

2. That the "minimum standards" affected union and nonunion employees equally.

Unlike the statute in *Metropolitan*, the Maine statute intrudes on the bargaining *process*. In Maine, by the Supreme Judicial Court's holding, a union employer must agree on severance pay with the union or face liability under the statute. J.S. App. A at A12. Thus, the statute grants unions a bargaining chip and restricts an employer's use of economic self-help. The union's bargaining chip is either to hold out for more than the statutory severance benefit or, in lieu of all or part of that benefit, to bargain for other benefits. This bargaining chip is crucial because, on the other side of the Maine collective bargaining table, the employer is not free after impasse either to refuse to provide severance pay or to institute a plan providing less than the statutory benefit. This was not the case in *Metropolitan*, where this Court emphasized that employers retained the unilateral ability to avoid statutory liability by self-insuring or by not agreeing to provide insurance coverage. 105 S. Ct. at 2394. Union employers in Maine do not have similar options; they must agree with the union or pay benefits under the statute.

The Maine statute also fails the second *Metropolitan* criterion by not "affect[ing] union and nonunion employees equally." 105 S. Ct. at 2397. Because it does not establish a minimum benefit standard, the statute promotes inequality. The statutory severance benefit of one week's pay per year of service does not apply if there is an express contract providing severance pay at any level. Thus, an employer not subject to collective bargaining may unilaterally institute a severance pay plan with whatever benefit level it wishes to provide and thereby avoid the statutory liability. As discussed above, however, employers subject to collective bargaining cannot similarly avoid the reach of the statute. In *Metropolitan*, this Court stated:

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment

> that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S., at 202. It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who had chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Id. at 2398. Conversely, it does not further any purpose of the NLRA to saddle union employers with statutory obligations that other employers may avoid. The effect of the statute is to discriminate against workers who freely exercise their NLRA Section 7 "right to *refrain* from [union] activities." 29 U.S.C. § 157 (emphasis supplied).

The Maine Supreme Judicial Court also incorrectly characterized the Maine statute as a valid exercise of the state police power. The statute is inconsistent with the purposes of the NLRA and does not provide economic protection to all citizens. In *Metropolitan*, the Court found a valid exercise of the police power where the statute established generally applicable minimum employment standards not *inconsistent* with the purposes of the NLRA. 105 S. Ct. at 2398-99. State child labor, minimum wage, and health and safety laws, cited in *Metropolitan* as proof that Congress did not intend the NLRA to supplant all state mandated-benefits statutes (105 S. Ct. at 2398), differ from the Maine severance pay statute in two respects. First, they do not establish *optional* standards; they mandate uniform minimum standards that operate to protect all workers in their individual capacities. Maine boldly states that employers will not violate its statute even if they "eliminate severance pay entirely."Appellee's Motion to Dismiss or Affirm at 8 n.5. *Metropoltan*, with its emphasis on protection of the individual worker, does not authorize such a scheme. Second, as with insurance,

Congress has authorized the states to regulate child labor, minimum wages, and employee health and safety. *See* McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq.;* Fair Labor Standards Act, 29 U.S.C. § 201; Occupational Safety and Health Act, 29 U.S.C. § 667. There is no similar Congressional intent to preserve state regulation of severance benefits. Indeed, severance pay is a matter of exclusive federal concern. *Holland* and *Gilbert, supra.*

In sum, the Maine statute i) interferes with the bargaining process, ii) sets up a standard that nonunion employers can avoid easily and that unions can bargain away if they extract a satisfactory *quid pro quo*, and iii) interferes in an area in which the states retain little, if any, regulatory authority. Therefore, this Court's decisions in *Golden State* and *Metropolitan* dictate NLRA preemption.

CONCLUSION

For the foregoing reasons, the undersigned respectfully request that the judgment of the Maine Supreme Judicial Court be reversed.

Respectfully submitted,

John C. Yavis, Jr.
Thomas M. Cloherty
Barry J. Waters
Thomas J. Joyce

All of:
Murtha, Cullina, Richter and Pinney
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone: (203) 240-6000

Attorneys for Appellant

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No. 86-341

In The
Supreme Court of the United States
October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, et al.,
Appellees.

On Appeal from the Maine Supreme Judicial Court

BRIEF FOR APPELLEE P. DANIEL COYNE

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
(Counsel of Record)
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
(207) 289-3661

Attorneys for Appellee
P. Daniel Coyne, Director
Bureau of Labor Standards,
Maine Department of Labor

January 30, 1987

COCKLE LAW BRIEF PRINTING CO. (800) [illegible]

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QUESTIONS PRESENTED

1. Whether a state statute that imposes a one-time obligation to provide severance pay in the absence of an agreement between employer and employee creates a private "employee benefit plan" within the meaning of ERISA and is therefore preempted by 29 U.S.C. § 1144(a).

2. Whether a state statute that applies alike to union and non-union workers, that does not interfere with any of the economic self-help weapons available to combatants in a labor dispute, and that imposes certain substantive terms on the employer-employee relationship is preempted by the National Labor Relations Act.

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BRIEF FOR APPELLEE P. DANIEL COYNE

STATEMENT OF THE CASE

A. The Maine Severance Pay Statute

The Maine severance pay statute, which is codified at Me.Rev.Stat.Ann., tit. 26, § 625-B (Supp. 1986), is designed to reduce the severe and sudden economic effect of a major plant closing upon the affected employees and the surrounding community. *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d 247, 254-55 (Me. 1974) (discussing earlier version of current statute). The problem of plant closings is particularly acute in Maine because of the number of Maine

towns where one major plant is the dominant employer. No other state has such a law.

The Maine statute applies to employers who have more than 100 workers and who close their plants or relocate more than 100 miles. § 625-B(1)(A), (F), (G). There is no liability under the statute if an employee is covered by an express contract on the subject of severance pay. § 625-B(3)(B). There is also no liability if the plant closing results from bankruptcy or natural calamity. § 625-B(3)(A). *See* § 625-B(1)(E). Only employees who have worked at a plant for three years or more are entitled to severance pay, and the statute requires that each eligible employee be paid one week of severance pay for each year the employee worked at the plant. §§ 625-B(3)(D), § 625-B(2).

B. The Closing of the Fort Halifax Plant

Prior to May 1981, the Fort Halifax Packing Company ("Fort Halifax") operated a poultry processing and packaging plant that employed more than 100 employees in Winslow, Maine. Fort Halifax began operating the Winslow plant in 1972, when it purchased the plant and certain other assets from the Ralston Purina Company. The Winslow plant had previously been operated by Ralston Purina from 1961 through 1972 and by the CMT Company, Inc. prior to 1961. (J.A. 6-7). As of May 1981, therefore, a number of Fort Halifax employees had worked continuously at the Winslow processing plant for 20 years or more.[1]

[1] The number of years each Fort Halifax employee had been employed at the Winslow plant is set forth in Exhibit A to the Supplementary Employee list filed on June 3, 1983 in the trial court.

On May 23, 1981 Fort Halifax ceased all processing at the Winslow plant and laid off almost all of its employees. (J.A. 8). Fort Halifax did not pay its employees severance pay as provided by 26 M.R.S.A. § 625-B.

At the time of the plant closing, most of the Fort Halifax employees were represented by Local 385 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its successor, the United Food and Commercial Workers, AFL-CIO. (J.A. 7).[2] The existing collective bargaining agreement between Fort Halifax and Local 385 (J.A. 10-34), had been entered into on June 20, 1979 and was due to expire on June 2, 1982. This agreement contained no provision for severance pay. (Tr. 86). There was also no contract or agreement on the subject of severance pay between Fort Halifax and its non-union supervisory and clerical personnel. (Tr. 99).

More than five months after Fort Halifax ceased all processing operations at the Winslow plant, Fort Halifax and Local 385 reached a new agreement on certain amendments to the collective bargaining contract. (J.A. 34-39). This agreement, which was signed on November 1, 1981, arose out of efforts by Fort Halifax to dispose of the plant after the shutdown or allow it to be reopened under new management. (Tr. 112-13). It was intended to take effect only if the plant were reopened. (Tr. 87-89). For the first time, the November 1, 1981 amendment contained provisions covering severance pay. (J.A. 36-38). These provisions, which limited severance pay to a maximum of four

[2] A few workers at the Fort Halifax plant were represented by Local 340 of the Teamsters Union. Trial Transcript of April 1, 1985 (hereinafter cited as "Tr.") at 103-04.

weeks or 8% of the previous year's earnings, were expressly designed to supplant the state severance pay law pursuant to the "express contract" exception contained in 26 M.R.S.A. § 625-B(3)(B). (J.A. 37). Because the plant was not reopened, however, these provisions never took effect. (Tr. 87-89).

As of May 1981 Fort Halifax was a wholly-owned subsidiary of Corbett Enterprises, Inc., a holding company whose headquarters are located in West Hartford, Connecticut. Corbett Enterprises, Inc. maintained two ERISA-covered retirement plans for its employees and the employees of its subsidiaries. Production workers employed by Fort Halifax were covered by the Corbett Enterprises Retirement Plan for Production Employees (the "Production Employees' Plan"). (J.A. 40-67). Supervisory and clerical personnel employed by Fort Halifax were covered by the Corbett Enterprises Retirement Plan for Sales, Administrative and Clerical Employees. (J.A. 8). Neither of these plans contained any provision for severance benefits.[3]

The Corbett retirement plans provide for payment of modest pension benefits commencing when an employee reaches retirement age, along with certain death benefits. These payments are increased if an employee chose to contribute a portion of his annual earnings while working. *See* Production Employees' Plan, Section 3.1 (J.A. 43). For production employees who did not contribute any portion of their own earnings, the annual retirement benefit amounts to 1¼% of the first $6,000 of their annual earnings for each year of service completed after February 5, 1972. Production Employees' Plan, section 4.1(a). (J.A. 45). The maximum annual benefit can thus be calculated by multiplying $75 by the number of qualifying years of service. Under this formula, and aside from any amounts that might be attributable to employee contributions, Fort Halifax employees who had completed ten years of service as of the 1981 plant closing will receive an annual retirement benefit of $750.[4]

Pursuant to the terms of the retirement plans, employees who had voluntarily contributed portions of their wages could elect to withdraw those contributions at any time. *See* Production Employees' Plan, section 3.5. (J.A. 44).[5] Except for their continued right to request return of their own contributions, however, Fort Halifax employees were not entitled to receive any distributions from the retirement plans at the time of the closing of the Winslow plant

[3] Tr. 103. Excerpts from the Production Employees' Plan are contained in the Joint Appendix at 40-67. The complete texts of both plans are contained in the record as exhibits to the federal stipulation which was admitted into evidence at trial. See Tr. 2-3, J.A. 6-9.

[4] Since the plan only credits years of service completed after February 5, 1972, ten years of service is the maximum amount that will be allowed to Fort Halifax employees.

[5] Production employees who annually contributed 5% of their earnings to the retirement plan would be eligible to receive an additional annual amount equaling 1 3/4% of their annual earnings between $6,000 and $20,000 for each year of service. Production Employees' Plan, sections 3.1, 4.1(a) (J.A. 43, 45). The average Fort Halifax production employee earned $10,611.84 in 1980, according to the information contained in Exhibit A to the Supplementary Employee List filed on June 3, 1983 in the trial court. For a production employee whose annual earnings were $10,600, who had ten years of service, and who had contributed 5% of earnings for each of those ten years, the annual retirement benefit would be increased to $1,555.00.

in May of 1981. Under the plans, benefits are payable only when an employee dies or reaches retirement age. *See* Production Employees' Plan, sections 4.5, 5.4, and 6.2. (J.A. 47, 55, 57). Although Fort Halifax now suggests that its employees became eligible for immediate vesting and distribution of plan assets as a result of the plant closing (Appellant's Brief at 3), the record demonstrates only that existing retirement benefits became vested at that time.[6] No distributions were made. Thus, when asked at a deposition in March of 1982 what benefits were being provided to Fort Halifax employees under the pension plans, Fort Halifax vice-president Harvey McGuire responded, "I haven't had anyone die or retire."[7]

C. Proceedings Below

On November 2, 1981 the Director of Maine's Bureau of Labor commenced an action against Fort Halifax to enforce the severance pay law. (J.A. 4-5). That action, filed on behalf of all of the Fort Halifax employees pursuant to 26 M.R.S.A. § 625-B(5), subsumed an action filed several days previously by eleven individual employees, *Bourgoin, et al. v. Fort Halifax Packing Co.*, Docket No. CV-81-515 (Maine Superior Court, Kennebec County), and the two cases were eventually consolidated.

Fort Halifax thereafter answered and raised numerous defenses, alleging that the severance pay law was in-

[6] Tr. 76. Under the terms of the plans, it further appears that such vesting could only have resulted because Fort Halifax exercised its right to terminate the plans as of the date of the plant closing. *See* Production Employees' Plan, sections 11.1 and 11.2 (J.A. 60).

[7] Deposition of Harvey McGuire, Jr. taken on March 24, 1982, at p. 34. *See also* Tr. 98.

applicable on various grounds, that it unconstitutionally impaired the obligation of contracts, that it was being applied retroactively in violation of due process, and that it was preempted by ERISA. See Appendix to Jurisdictional Statement ("J.S. App.") at A69-72.

On October 29, 1982, ruling on cross motions for summary judgment, the Maine Superior Court issued an opinion and order rejecting Fort Halifax's various challenges to the applicability and validity of the statute. (J.S. App. at A30-43). In particular, the court rejected Fort Halifax's argument that the Maine severance pay law was preempted by ERISA:

> The subject targeted in ERISA is the employer-employee relationship as expressed in private benefit plans, not state statutes enacted pursuant to the police power to alleviate the impact of job termination. 29 U.S.C. § 1003(a). The severance pay provisions of 26 M.R.S.A. § 625-B are not employee benefit plans as defined in 29 U.S.C. § 1002. These provisions are not "plans" and are not "established or maintained" by an "employer" or an "employee organization." . . .

(J.S. App. at A34-35). The Superior Court granted partial summary judgment against Fort Halifax on the issue of liability, noting that a further determination was necessary as to the specific employees entitled to receive severance pay and the amount of severance pay that those employees should receive. (J.S. App. A42).[8]

[8] At the same time, the Superior Court granted leave to add Corbett Enterprises as a party but dismissed the State's claim against Corbett Brothers, a subsidiary of Fort Halifax that did not employ 100 persons. (J.S. App. A32-33, A39). Corbett Enterprises was later dismissed by consent of all parties.

Thereafter Fort Halifax filed another motion for summary judgment on the ground, *inter alia,* that the severance pay statute was preempted by the National Labor Relations Act (NLRA). That motion was denied on March 18, 1983 without opinion. (*See* J.S. App. A23).[9] The parties then reached an agreement on the eligibility and amounts owed to the specific Fort Halifax employees, with the exception of some 30 employees whose eligibility was disputed and as to which Fort Halifax contended a trial was necessary. After various continuances, a one-day trial on the remaining issues was held by the Superior Court on April 1, 1985.

A month later the Superior Court issued an order and judgment finding in favor of the State except with respect to a handful of employees. (J.S. App. A21-29). At the outset, the court noted that Fort Halifax had renewed its arguments that the severance pay law was preempted by ERISA and by the NLRA and was otherwise unconstitutional. However, it added that even if the law of the case doctrine did not stand as an obstacle to reopening those issues, "this Court is unpersuaded by defendant's arguments

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[9] In the meantime, Corbett Enterprises and Fort Halifax had attempted to remove the case to the U.S. District Court for the District of Maine and had simultaneously filed a separate federal action seeking declaratory and injunctive relief against enforcement of the severance pay law. *Corbett Enterprises, Inc., et al. v. Ewing,* Civil Action No. 83-0020-B (D. Me). By order filed February 16, 1983, the U.S. District Court remanded the instant case as having been removed improvidently and without jurisdiction since no federal question appeared on the face of the complaint. The federal lawsuit filed by Corbett Enterprises and Fort Halifax remained pending but was eventually dismissed on October 3, 1986 on grounds of *res judicata* and abstention. At that time the District Court observed that the issues would ultimately be resolved by the pending appeal to this Court.

on unconstitutionality and preemption." (J.S. App. A23). The Superior Court's judgment awarded severance pay to 85 specified former employees of Fort Halifax. (J.S. App. A26-29). The average amount of severance pay awarded per employee was $2,611.76.

Fort Halifax then appealed to the Maine Supreme Judicial Court, raising various challenges to the severance pay law, including its preemption arguments, and alleging that the Superior Court had also committed various procedural errors. In an opinion issued on June 2, 1986 the Maine Supreme Judicial Court rejected Fort Halifax's challenges to the statute and affirmed the judgment with minor modifications. (J.S. App. A1-20). On the subject of ERISA preemption, the Supreme Judicial Court concluded that the severance pay statute "does not affect employee benefit plans that are within ERISA's regulatory reach." (J.S. App. A7). It found that the severance pay liability created by the statute is not a plan created by an employer or employee organization but a state benefit created as an exercise of the police power for the purpose of dealing with the economic dislocation that accompanies the shutdown of large industrial or commercial facilities. (J.S. App. A8). The court added that under the express contract exception contained in 26 M.R.S.A. § 625-B(3)(B), the severance pay law would generally be inoperative whenever there was a private employee benefit plan providing severance pay, thus eliminating any overlap between ERISA and the Maine severance pay statute. (J.S. App. A8-9).

On the subject of NLRA preemption, the Maine Supreme Judicial Court observed that "state laws of general application that impose minimal substantive requirements on contract terms are not preempted." (J.S. App. A10, *cit-*

ing Metropolitan Life Ins. Co. v. Massachusetts, 105 S.Ct. 2380 (1985)). The court found that Maine's severance pay law was a legitimate exercise of the State's police power, that it affected union and nonunion employees equally, and that it did not limit the rights of self-organization or interfere with the collective bargaining process under the NLRA. Accordingly, the court held that the severance pay law was not preempted under the doctrine of NLRA preemption derived from *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976). (J.S. App. A11-12).[10]

SUMMARY OF ARGUMENT

Contrary to the argument made by Fort Halifax, "the preemptive scope of ERISA is neither all-encompassing . . . nor unlimited." *Rebaldo v. Cuomo,* 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied,* 105 S.Ct. 2701 (1985) (citations omitted). While it is not disputed that Congress intended ERISA to occupy the field, the specific field which ERISA occupies is the field of private employee benefit plans. *See* 29 U.S.C. §§ 1001(a), 1002(1), 1002(2), 1003(a). In consequence, ERISA's preemption provision supersedes state laws "only insofar as they relate to plans covered by ERISA." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 n.17 (1983).

[10] The court also noted that the severance pay law did not implicate the other doctrine of NLRA preemption derived from *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), but that even if it did, the law would be saved from preemption because it reflected a substantial or deeply-rooted State interest. (J.S. App. A14, citing *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290 (1977)).

In this case the only private employee benefit plans established or maintained by Fort Halifax are its retirement plans. Those plans have not been altered or affected in any way by the Maine severance pay statute. As a result, the Maine severance pay statute does not relate to any existing ERISA-covered plan in this case. Fort Halifax contends, however, that the Maine statute is nevertheless preempted because it creates a statutory ERISA plan of its own.

This argument is untenable for several reasons. First, the Maine statute does not require employers to maintain any plan because it expressly defers to any private severance pay agreement that may be reached between employer and employee. 26 M.R.S.A. § 625-B(3)(B). Indeed, although the agreement in question never took effect, Fort Halifax and its employees reached an agreement covering severance pay in connection with the proposed reopening of the plant in this case. Second, the Maine statute lacks the essential elements of an ERISA plan. Thus, the Maine statute does not require an employer to maintain an ongoing program of benefits and has none of the statutory attributes of an ERISA plan. Most importantly, the Maine statute neither constitutes nor creates a plan that is "established or maintained by an employer or by an employee organization." 29 U.S.C. § 1002(1), 1002(2). *See* 29 U.S.C. § 1003(a). This is crucial because a fundamental purpose of ERISA was to prevent abuses in privately administered plans, and no potential for such abuse exists with respect to a statutory obligation administered by the State.

Moreover, if the Maine severance pay statute is preempted because it is deemed to require employers to maintain an ERISA-covered plan, then it would be preempted even in the case of employers who have no pension plan or

employee benefit plan of any kind. Such employers are not subject to any regulation under ERISA. Nevertheless, under the theory offered by Fort Halifax, those employers would nevertheless be able to take advantage of ERISA preemption to escape their obligations under Maine law. Nothing in the ERISA statute or its legislative history warrants this result.

Given that the Maine statute has none of the essential attributes of an ERISA-covered plan, the argument for preemption reduces to the claim that ERISA precludes states from mandating any employee benefits that might be included in an ERISA plan. The answer to this argument is that Congress intended ERISA to regulate the field of "employee benefit plans," *not* the entire field of "employee benefits." 29 U.S.C. § 1144(a) thus preempts State laws only insofar as they relate to ERISA-covered "plans," and it does not reach the Maine severance pay statute in this case.

Even assuming, however, that a contrary conclusion were reached and the Maine severance pay statute were somehow found to relate to an ERISA-covered plan, the Maine statute would nevertheless escape preemption because of the exception for state unemployment compensation laws. *See* 29 U.S.C. §§ 1003(b)(3), 1144(a). The legislative history of the severance pay statute and the decisions of the Maine courts establish that the severance pay law was designed to respond to the "unemployment crisis" caused by a major plant closing. *Shapiro Bros. Shoe Co. v. Lewiston Auburn Shoeworkers Protective Assn.*, 320 A.2d 247, 254-55 (Me. 1974). While the severance pay statute is

not a traditional form of unemployment compensation law, this does not disqualify it from the exception to ERISA preemption under § 1003(b)(3). *See Metropolitan Life Insurance Co. v. Massachusetts,* 105 S.Ct. 2380, 2390 (1985) (neither ERISA statute nor its legislative history draws any distinction between traditional and non-traditional insurance laws for purposes of the insurance exception to ERISA preemption).

Finally, although Fort Halifax advances the alternative claim that the Maine severance pay statute is preempted by the National Labor Relations Act, this argument is foreclosed by *Metropolitan Life Ins. Co. v. Massachusetts,* 105 S. Ct. at 2393-99. *Metropolitan Life* ruled that the NLRA does not preempt a state from imposing substantive terms on the employment relationship through legislation establishing minimum labor standards. Like the Massachusetts statute at issue in *Metropolitan Life,* the Maine severance pay statute is not addressed to the collective bargaining process and does not regulate the economic weapons available to combatants in a labor dispute. Instead, it requires that union and non-union employees receive a specific benefit under certain circumstances. As a result, it falls within the category of legislation establishing "minimum labor standards" as that term is used in *Metropolitan Life,* 105 S.Ct. at 2397.

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ARGUMENT

I. The Maine Severance Pay Law Is Not Preempted by ERISA Because It Does Not Relate to an ERISA-Covered Plan

The doctrine of preemption is based upon the Supremacy Clause, which invalidates state laws that "interfere with, or are contrary to the laws of Congress." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211 (1824). Preemption exists only when there is a conflict between state and federal regulations or when Congress has intended to displace state law, either expressly or by implication. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141-42 (1963). The presumption is against preemption. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). As this Court has emphasized, "Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981). *Accord, Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522 (1981); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. at 142.

In this case the issue is whether the Maine severance pay statute is nullified by the express preemption provision contained in the Employee Retirement Income Security Act of 1974 (ERISA). As discussed below, neither the language of the ERISA statute nor its underlying policies support a finding of preemption in this case.

A. By Its Express Terms, ERISA Preempts State Laws Only Insofar as Such Laws Relate to Employee Benefit Plans Covered by ERISA

The entire focus of ERISA is on privately-created and privately-administered employee benefit plans. An employee benefit plan covered by ERISA is defined as a "plan, fund or program . . . established or maintained by an employer or by an employee organization" for the purpose of providing certain benefits. 29 U.S.C. §§ 1002(1), (2). Under the statute such plans are divided into two categories: "employee pension benefit plans" and "employee welfare benefit plans." *See* 29 U.S.C. §§ 1002(1), (2), (3). Employee pension benefit plans provide for retirement or deferred income. 29 U.S.C. § 1002(2). Employee welfare benefit plans provide medical, accident, unemployment, and other non-pension fringe benefits. 29 U.S.C. § 1002(1).[11]

The ERISA statute creates detailed reporting, disclosure, and fiduciary responsibilities that are applicable to both pension and welfare benefit plans. 29 U.S.C. §§ 1021-31, 1101-14. In addition, it mandates specific participation, vesting, and fiduciary requirements for pension plans and establishes a system of insurance to protect the rights of pensioners in the event of a pension plan termination. 29 U.S.C. §§ 1051-86, 1301-68. In enacting these provisions, Congress had two basic purposes. The first was to prevent abuses in privately-administered employee benefit plans. *Massachusetts Mutual Life Ins. Co. v. Russell,*

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[11] Because 29 U.S.C. § 1002(1) incorporates by reference "any benefit described in 29 U.S.C. 186(c)," severance benefits are included within the various fringe benefits that may be offered by an ERISA-covered welfare plan.

105 S.Ct. 3085, 3090 n.8 (1985); *Donovan v. Dillingham,* 688 F.2d 1367, 1370 (11th Cir. 1982) (en banc); *Wadsworth v. Whaland,* 562 F.2d 70, 73-74 (1st Cir. 1977), *cert. denied,* 435 U.S. 980, 981 (1978). The second was to ensure that upon retirement, workers actually received the pension benefits they had been promised. *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 374-75 (1980).

Like the ERISA statute itself, ERISA's preemption section focuses on private employee benefit plans. Specifically, it preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). Thus, the key to preemption is whether a state law relates to an ERISA-covered plan, not whether it relates to any benefit that might be offered by an ERISA-covered plan. In other words, although severance pay may be among the benefits provided by an ERISA-covered plan, this does not mean that all state laws relating to severance pay are automatically preempted. Moreover, even where state laws do relate to ERISA-covered plans, 29 U.S.C. § 1144(a) does not preempt such state laws in their entirety but only "insofar as" those laws actually relate to ERISA-covered plans.

B. In This Case the Maine Statute Does Not Relate to Any Existing ERISA-Covered Plan

In this case, the only private employee benefit plans established or maintained by Fort Halifax were its retirement plans. Those plans have not been altered or affected in any way by the Maine severance pay law. The rights and obligations of Fort Halifax and its employees under the retirement plans, the assets and liabilities of those

plans, the administration of those plans, and the terms and conditions of those plans all remain unchanged. As a result, the Maine severance pay law cannot be found to relate to any existing ERISA plan in this case.

Indeed, Fort Halifax does not argue that the Maine severance pay law relates to its existing retirement plans. Instead, Fort Halifax suggests that the Maine severance pay law relates *generally* to ERISA-covered plans "because statutory liability can be avoided only if the employer adopts a private [severance] plan." (Appellant's Brief at 6; see *id.* at 15-16). In other words, it contends that the Maine law "relates" to an ERISA-covered plan because, under the express contract exception in 26 M.R.S.A. § 625-B(3)(B), the law is *inapplicable* if an employer has an ERISA severance plan. This argument, once stated, refutes itself. In *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 100 n.21 (1983), this Court pointed out that some state laws "may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." It is difficult to imagine a law which could affect an ERISA-covered plan in any more tenuous a manner than a law which does not apply in the presence of such a plan.

In fact, the "express contract" exception to the severance pay statute demonstrates that the Maine statute does not relate to private severance pay plans since it expressly preserves the freedom of employers and employees to enter private arrangements on the subject of severance. Under this provision employers can contract with their employees either to reduce the amount of severance pay owed or to eliminate severance pay entirely. Indeed, although the agreement in question never took effect, Fort Halifax entered into just such an agreement

in connection with the proposed reopening of the plant in the instant case. (See J.A. 36-38). Thus, the only conceivable overlap between ERISA and the severance pay statute is in the case (not presented here) where private severance pay arrangements exist, and this overlap is largely eliminated by "express contract" exception in 26 M.R.S.A. § 625-B(3)(B).[12]

C. The Severance Pay Statute Does Not Itself Create An ERISA-Covered Plan

The principal argument advanced by Fort Halifax is that, although the Maine severance pay statute does not relate to any private ERISA plan in this case, the statute itself creates an ERISA-covered plan and requires employers to maintain such a plan. At the outset, however, the Maine statute does not "require" employers to maintain any plan because, as noted above, the statute expressly preserves private arrangements on the subject of severance pay, including agreements to eliminate severance pay entirely. Moreover, the theory that the Maine statute

[12] The amicus brief of the Chamber of Commerce argues that there would still be a conflict between ERISA and the Maine severance pay law in the hypothetical case of an employer who has an ERISA-covered severance plan but whose plan would not qualify as an express contract under 26 M.R.S.A. § 625-B(3)(B). See Chamber of Commerce Amicus Brief at 10-11. In that situation—absent special circumstances and assuming that the Maine statute is not otherwise exempt from preemption as a form of unemployment compensation law (see pp. 30-33 below)—the Maine statute would be required to yield to ERISA. Unlike the hypothetical employer suggested by the Chamber of Commerce, however, Fort Halifax did not have an ERISA-covered severance pay plan in this case and accordingly, no such conflict is presented here.

creates an ERISA plan cannot withstand scrutiny for several fundamental reasons.

First, this theory ignores the fact that in enacting ERISA, Congress was focusing on employee benefit plans that were privately created and privately administered. The requirement that an ERISA-covered plan must be "established or maintained by an employer or by an employee organization" is contained in ERISA's definitional sections, 29 U.S.C. §§ 1002(1) and (2), and is reiterated in the section which sets forth the limits of ERISA's coverage. 29 U.S.C. § 1003(a). The same requirement was specifically noted in the legislative history of the ERISA preemption section.[13]

In contrast, the Maine severance pay statute is not a private employee benefit plan established or maintained by an employer or union; it is an independent statutory obligation established and administered by the State. This point is crucial because, as noted above, a fundamental purpose of ERISA was to prevent abuses in privately-administered plans. *E.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 105 S.Ct. at 3090 n.8 ("the crucible of congressional concern was misuse and mismanagement of

[13] Both the Senate and House conference reports state that under the conference substitute for the preemption provision, which was thereafter enacted as 29 U.S.C. § 1144(a), "the provisions of [ERISA] title I are to supercede all state laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 383 (1974), reprinted in 3 [1974] U.S. Code Cong. & Admin. News 5038, 5162; S. Rep. No. 93-1090, 93d Cong., 2d Sess. 383 (1974).

plan assets"); *Donovan v. Dillingham*, 688 F.2d at 1370 ("Congress enacted ERISA to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans"). No potential for such abuse exists with respect to a statutory obligation administered by a state agency.

Second, the Maine severance pay law lacks another essential element of an ERISA plan in that it does not create an ongoing program of benefits but merely imposes a one-time obligation in the event of a plant shutdown. While Congress did not define what it meant by a "plan, fund, or program" as used in 29 U.S.C. §§ 1002(1) and (2), the overall structure of the ERISA statute demonstrates that it contemplated an ongoing program of benefits in order for the reporting and fiduciary requirements of ERISA to apply. *See, e.g.*, 29 U.S.C. §§ 1023, 1103, 1106-07. A lump sum payment of benefits on a single occasion is not sufficient to constitute an ERISA plan. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358, *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 435, 670 (1986) ("It is difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan"). *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). Accordingly, the Maine severance pay law does not qualify as an ERISA plan because it is a one-time statutory assessment that applies only in the event of

a plant closing and does not create an ongoing benefit program.[14]

Furthermore, in enacting ERISA, Congress viewed "plans" as entities that were separate and distinct from the employers who established them. *See, e.g.*, 29 U.S.C. § 1001(a).[15] It provided that such "plans" could sue and be sued as entities in their own right and that only the "plan" (and not the employer) would be liable for the payment of benefits. 29 U.S.C. §§ 1132(d)(1), (2). This is part of an overall scheme which requires that plan assets be held in trust and that they be managed by persons who are expressly designated as fiduciaries. 29 U.S.C. §§ 1102-03. The Maine severance pay statute, in contrast, does not require the creation of any trust fund or other separate entity but constitutes a liability assessed against an employer's general assets. Thus, the severance pay statute has none of the essential attributes of an ERISA-covered plan.

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[14] The amicus brief of the United States suggests that this analysis is inconsistent with the fact that death benefits are among the benefits that may be provided by an ERISA-covered plan, 29 U.S.C. § 1002(1). (Amicus Brief of the United States at 17). This misses the point. While death benefits generally involve a one-time payment as far as each beneficiary is concerned, the payment of death benefits to various beneficiaries over time nevertheless constitutes an ongoing program of benefits. In contrast, a one-time statutory assessment payable to eligible employees upon a single occasion (a plant closing) does not constitute an ongoing program of benefits.

[15] 29 U.S.C. § 1001, which consists of the Congressional findings and declaration of policy for the ERISA statute, is notably absent from the statutory provisions which are reproduced in the Appendix to Appellant's Jurisdictional Statement. For the convenience of the Court, it is reproduced as an Appendix to this brief.

The cases relied upon by Fort Halifax are not to the contrary. In *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), and *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), this Court summarily affirmed decisions holding that ERISA applied to an employer's informal severance pay policy even though that policy was unfunded and benefits were payable only out of an employer's general assets. Those cases, however, involved an informal severance pay policy that was privately initiated and privately administered. As numerous courts have held, ERISA must be found to cover such arrangements because the alternative would be to allow employers to circumvent ERISA by maintaining informal plans that did not comply with ERISA requirements. *E.g., Scott v. Gulf Oil Corp.*, 754 F.2d at 1503; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 183 (1986); *Donovan v. Dillingham*, 688 F.2d at 1372; *Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188, 1195 (E.D.Mo. 1980), *aff'd*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).[16] The same concern was expressed by the Second Circuit in *Gilbert*. *See* 765 F.2d at 328-29.

[16] Both Fort Halifax and amici rely upon the discussion of an ERISA "plan" contained in *Donovan v. Dillingham*, 688 F.2d at 1373. In that case, the Eleventh Circuit was attempting to determine whether employers who purchase group health insurance through a multiple employer trust could thereby be found to have established an ERISA-covered "plan." If not, they would have escaped regulation under ERISA. *Donovan's* definition of an ERISA "plan" in that context simply has no relevance to the entirely different issue in the case at bar. Significantly, *Donovan* rejected the Secretary of Labor's contention that any decision to provide a benefit listed in 29 U.S.C. § 1002 (1) constituted the establishment of an ERISA-covered plan. 688 F.2d at 1372-73.

This logic, however, does not justify the extension of ERISA to cover Maine's severance pay statute. Unlike an informal benefit policy maintained by an employer—which is subject to precisely the kind of abuses which ERISA was designed to prevent—the severance pay statute creates a formal statutory obligation which is fully disclosed to employees, which is administered by a state agency, and which is not subject to manipulation by employers. As a result, the protections of ERISA are unnecessary, and the *Gilbert* line of cases thus does not support the argument that the Maine severance pay statute "creates" an ERISA-covered plan.[17]

In arguing that the Maine severance pay statute is nevertheless preempted because it creates an ERISA-covered plan, both Fort Halifax and amici rely upon *Standard Oil Co. v. Agsalud*, 442 F.Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). The *Agsalud* case, however, differs from this

[17] *Gilbert* and *Holland* are distinguishable in other important respects as well. Those cases involved an established and ongoing severance pay policy applicable to all employees. In contrast, as noted above, the severance pay law constitutes a one-time statutory assessment applicable only in the event of a plant closing and does not create an ongoing benefit plan subject to ERISA. In addition, both *Gilbert* and *Holland* were cases where the employees had asserted both ERISA claims and claims under state law. Since the employer's private severance pay policy was found to constitute an ERISA-covered plan and since regulation under ERISA is exclusive, the employees' state law claims were preempted. In the instant case, unlike *Gilbert* and *Holland*, the Fort Halifax employees cannot be relegated to their remedies under ERISA because no ERISA remedies are available, and their only recourse is under the Maine severance pay law. *See Scott v. Gulf Oil Corp.*, 754 F.2d at 1505-06 (ERISA preemption not applied where plaintiffs would be left without any avenue of redress).

case for several fundamental reasons. First, the Hawaii statute at issue in *Agsalud* required employers to establish a comprehensive health care plan. Such a plan, which had all of the attributes of an ERISA-covered plan, necessarily constituted the kind of ongoing benefit program contemplated by ERISA. In addition, the health care plan in question was to be privately administered. This meant that, although required by the State, the plan was nevertheless "maintained" by employers and thus met the statutory requirement that an ERISA-covered plan be "established or maintained" by an employer or union. 29 U.S.C. §§ 1002(1), 1002(2), 1003(a). In contrast, Maine's severance pay law imposes a one-time payment in the event of a plant closing; as noted above, it is neither an ongoing program of benefits nor does it have any of the other attributes of an ERISA-covered plan. Moreover, it cannot be said to be "maintained" by an employer or union.

The Hawaii statute at issue in *Agsalud* also related to an ERISA-covered plan in that it imposed certain specifc additional requirements on Standard Oil's existing ERISA plan. Thus, the Hawaii statute specifically required that Standard Oil's ERISA plan include coverage for alcohol and drug abuse; in addition, the Hawaii statute included reporting requirements that differed from those of ERISA. *See* 442 F.Supp. at 696. Indeed, the Hawaii statute could best be described as a "mini-ERISA" statute covering health benefit plans. Unlike Hawaii's Prepaid Health Care Act, the Maine severance pay does not in any way alter or affect the rights or obligations of Fort Halifax under its existing ERISA plans. As a result, the Maine

law does not invade the area regulated by ERISA and is not preempted.[18]

In sum, the theory that the Maine severance pay statute creates an "employee benefit plan" within the meaning of ERISA stretches the concept of an ERISA-covered plan beyond recognition. "[T]o be properly characterized as an ERISA employee benefit plan, a plan must satisfy the definitional requirements of [29 U.S.C. § 1002] in both form and substance." H. Rep. No. 94-1785, 94th Cong., 2d Sess. 48 (1977). The Maine severance pay law satisfies those requirements in neither respect. Moreover, in preemption cases, the intent of Congress is the "ultimate touchstone," *California Federal Savings and Loan Assn. v. Guerra,* 55 U.S.L.W. 4077, 4080 (Jan. 13, 1987),

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[18] Fort Halifax and *amici* also rely upon the subsequent Congressional response to the *Agsalud* decision in Pub. L. No. 97-473 § 301, 96 Stat. 211. See Brief for Appellant at 11, 14; Amicus Brief for the United States at 20-22. As this Court has noted, the statements of a subsequent legislature are not a reliable guide to the intent of its predecessors, and such statements are accordingly entitled to little weight. *E.g., Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 758 (1979); *Rainwater v. United States,* 356 U.S. 590, 593 (1958). Indeed, the statement of Representative Erlenborn which Fort Halifax twice quotes (Appellant's Brief at 11, 14) was inserted into the Congressional Record without being spoken on the floor. 128 Cong. Rec. H9609-10 (daily ed., Dec. 13, 1982). In addition, as the United States acknowledges (Amicus Brief for the United States at 21 n.15), the Senate report on Pub.L.No. 97-473 suggests that the Senate Committee in fact disapproved of the result in *Agsalud. See* S. Rep. 97-646, 97th Cong., 2d Sess. 18 (1982) ("The Committee believes that the preemption of the Hawaii Prepaid Health Care Act by ERISA is inadvertent"). Finally, in view of the fundamental differences between the Maine severance pay law and the Hawaii statute at issue in *Agsalud,* neither that decision nor the Congressional response to that decision are in any way dispositive here.

and Congress did not intend to embrace one-time statutory obligations within the category of ERISA-covered plans.[19]

The fallacy of the theory that the Maine law creates an ERISA-covered plan is most clearly demonstrated by the anomalous and illogical results that would follow from acceptance of such a theory. If the severance pay law is preempted because it is deemed to require employers to maintain an ERISA-covered plan, then it would be preempted even with respect to those employers who have no pension plan or employee benefit plan of any kind. Thus, the inevitable result of this argument is that an employer which has no ERISA plan and which is therefore not subject to regulation under ERISA in any way would nevertheless be able to take advantage of ERISA preemption to escape its obligations under the Maine severance pay law. This makes no sense. *See Marcal Paper Mills, Inc. v. Ewing,* 790 F.2d 195, 198 (1st Cir. 1986) (Aldrich, J., concurring).[20]

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[19] Even if the severance pay statute fell within the statutory definition of an ERISA-covered plan—which it does not—"it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Federal Savings and Loan Assn. v. Guerra,* 55 U.S.L.W. at 4080 (quoting other cases).

[20] Marcal involved a federal court challenge to the Maine severance pay law by an employer who had been sued in state court. In the First Circuit, two judges held that because of the pending state court case, the federal action had been properly dismissed under the doctrine of abstention. Judge Aldrich disagreed with his colleagues that abstention was appropriate but nevertheless concurred in the result, based on his view that the ERISA preemption claim should be rejected on the merits. The state's enforcement action against Marcal is still pending in the Maine courts. In that action, as in the First Circuit, Marcal is represented by the same counsel who has filed an amicus brief on behalf of the Chamber of Commerce in this case.

In *Marcal,* an employer who had no employee benefit plan of any kind nevertheless argued that the Maine severance pay statute was preempted by ERISA. Judge Aldrich's response was short and to the point: "I see no merit whatever in appellant's contention that ERISA preempts even when an employer has no plan." He went on to state that since Marcal was not subject to ERISA, it could not use ERISA to avoid the severance pay law: "[A]ppellant cannot have it both ways: no ERISA, and no State statute." 790 F.2d at 198.

D. Contrary to the Arguments Made by Fort Halifax and Amici, Congress Did Not Seek to Occupy the Entire Field of Employee Benefits

Given that the Maine severance pay law has none of the attributes of an ERISA-covered "plan," the argument for preemption reduces to the claim that states are preempted from mandating any of the benefits that might be offered by an ERISA-covered plan. In fact, this is precisely what Fort Halifax contends at pages 16-17 of its Brief. Similarly, the Solicitor General argues that "there is no legally significant distinction between mandating the establishment of a plan and mandating the payment of a benefit." (Amicus Brief for the United States at 14 n.10). The short answer to the argument is that Congress intended ERISA to regulate the field of employee benefit plans, *not* the entire field of employee benefits. Thus, 29 U.S.C. § 1144(a) does not preempt any and all state laws relating to "employee benefits." Nor does it preempt state laws relating to "employee benefits that would be eligible for inclusion in an ERISA-covered plan." Instead, it preempts state laws "only insofar as they relate to *plans* covered by ERISA." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 n.17 (1983) (emphasis added).

The findings and declaration of policy contained in the ERISA statute, 29 U.S.C. § 1001(a), demonstrate beyond dispute that the institution which Congress was intending to regulate was the private employee benefit plan. This is further confirmed by the legislative history of the preemption provision itself.[21] There is absolutely no evidence in the ERISA statute or its legislative history to suggest that at the same time that Congress enacted ERISA to regulate private employee benefit plans, it also sought to federalize the entire field of employee benefits. As the Ninth Circuit stated in *California Hospital Assn. v. Henning,* 770 F.2d 856, 861 (9th Cir. 1985), *amended on other grounds,* 783 F.2d 946 (9th Cir. 1986), *cert. denied,* 106 S.Ct. 3273 (1986), "Federal exclusivity [under ERISA] is a corollary of regulatory coverage, not an independent statutory goal." ERISA thus does not preclude the states from regulating the subject of employee benefits except insofar as such regulation relates to an ERISA-covered plan.

Moreover, the Maine statute at issue in this case is not intended to regulate employee benefits *per se.* Instead, it constitutes Maine's attempt to respond to the specific problem of plant closings, a problem which is particularly acute in those Maine towns where one plant is the dominant employer. While Maine is currently the only state with a severance pay statute, this does not in any way support the

[21] *See* 120 Cong.Rec. 29197 (statement of Rep. Dent that ERISA reserves to federal authority the sole power to regulate "the field of employee benefit plans"); *id.* at 29933 (statement of Sen. Williams that preemption provision was designed to eliminate the threat of conflicting or inconsistent state and local regulation of "employee benefit plans"); *id.* at 29942 (statement of Senator Javits that ERISA is intended to displace state action "in the field of private employee benefits programs").

argument for preemption. To the contrary, as Justice Brandeis originally pointed out, it is part of the genius of the federal system that a single state may serve "as a laboratory [for] novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932). Unless the Maine statute invades the area of exclusive federal regulation under ERISA, therefore, it may not be sacrificed in the name of national uniformity.

In this case, as shown above, the severance pay statute does not fall within the scope of ERISA's express preemption provision, nor do the policies underlying ERISA justify the extension of preemption in this situation. If the presumption against preemption in the absence of a clear expression by Congress is to have any meaning,[22] then the severance pay statute—which does not affect the existing retirement plans maintained by Fort Halifax and which does not create the kind of private employee benefit plan which Congress was intending to regulate under ERISA—cannot be found to be preempted in this case. Indeed, since a primary purpose of ERISA was to *protect* the benefit rights of employees, *e.g., Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. at 374-75, it would be both ironic and unfortunate if employers like Fort Halifax were able to invoke ERISA in order to avoid their obligations to their employees under Maine law.

[22] *See New York Department of Social Services v. Dublino,* 413 U.S. 405, 413 (1973), *quoting Schwartz v. Texas,* 344 U.S. 199, 202-03 (1952).

II. The Severance Pay Statute is Not Preempted By ERISA Because It is a Form of Unemployment Compensation Law

Aside from the fact that the Maine severance pay law does not relate to any ERISA-covered benefit plan, it is also exempt from preemption under ERISA for another reason. ERISA does not cover an employee benfit plan that "is maintained solely for the purpose of complying with applicable . . . unemployment compensation laws," 29 U.S.C. § 1003(b)(3), and accordingly state laws relating to such a plan are not preempted. 29 U.S.C. § 1144(a). Even assuming, therefore, that the Maine severance pay statute could somehow be found to create an "employee benefit plan" within the meaning of 29 U.S.C. § 1002(3), it would not be subject to preemption because it constitutes a form of unemployment compensation law.

In 1974, considering a predecessor of the existing severance pay law, the Maine Supreme Judicial Court recognized that its purpose was "to combat the unemployment crisis created when a large firm voluntarily shuts down on on short notice." *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d at 255. It recognized that the statute was designed both "to ameliorate the effect on a community when a large employer voluntarily goes out of business" and "to enable the affected worker to seek new employment, knowing that in the meantime he would receive at least some compensation after suddenly finding himself without work." *Id.* at 254. It also noted that the statute focused on those employers "most able to prevent the side effects of sudden unemployment." *Id.* at 256.

The version of the severance pay law that was considered by the Maine courts in the *Shapiro Bros.* case required severance pay only where an employer did not give 30 days notice of its intent to close a plant. 1971 Me. Laws, ch. 452. In 1973 this law was amended to require severance pay regardless of notice. 1973 Me. Laws, ch. 545. The sponsor of the 1973 amendment argued that this would not only assist employees but also would help the vast majority of employers by taking pressure off the state unemployment compensation fund and thereby holding down the rate of employer contributions. 1973 Maine Legis. Record 4093 (statement of Rep. Farley). He added that if a worker received 20 weeks of severance pay under the proposed amendment, that worker should not be able to seek unemployment compensation until the 20 weeks had gone by. *Id.* at 4094.[23] The legislative history of the 1973 amendment thus reemphasizes that the Maine Legislature regarded severance pay as a form of unemployment compensation.[24]

Obviously, the Maine severance pay statute is not a traditional form of unemployment compensation law. For example, it is not required under the statute that an employee remain unemployed in order to receive statutory

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[23] Contrary to the intent of the sponsor of the 1973 amendment to the severance pay law, however, the Maine Bureau of Employment Security has not treated the receipt of 20 weeks of severance pay as a disqualification for unemployment compensation until the full 20 weeks have passed.

[24] Although the law was subsequently amended, *see* 1975 Me. Laws, ch. 512, the modifications made in the law at that time did not change its basic concept.

severance pay.[25] This does not mean, however, that the severance pay statute is any less of an unemployment compensation law for purposes of ERISA preemption. As the Maine Supreme Judicial Court observed in the *Shapiro Bros.* case, "while the most common form of unemployment relief—the payment of benefits—follows the onset of the condition, not all legislative attempts to deal with these problems must take effect after the fact." 320 A.2d at 255. As the legislative history and the *Shapiro Bros.* case demonstrate, the severance pay law was in fact designed to respond to an "unemployment crisis." *Id.* And the reality is that a major plant closing in a small Maine town *is* an unemployment crisis. In such a situation, many workers will remain unemployed long after their traditional unemployment benefits have been exhausted.

In *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985), which involved ERISA's express exception from preemption for the state laws regulating insurance, *see* 29 U.S.C. § 1144(b)(2)(A), the insurer ar-

[25] In this connection, however, it should be noted that the trial court in this case ruled that four employees who transferred directly to another employer with no loss of pay were not eligible for severance pay because they had not suffered any "severance." (J.S. App. A24).

In its amicus brief, the United States points out that for purposes of unemployment compensation, Maine law currently defines wages to include severance pay, 26 M.R.S.A. § 1043 (19), leading in some cases to an increase of unemployment compensation as a result of the receipt of severance pay. However, this resulted from a 1985 amendment to the definition of wages, 1985 Me. Laws ch.348, which postdated the closing of the Fort Halifax plant by four years. More importantly, 26 M.R.S.A. § 1193(5) has consistently disqualified an employee who is receiving "terminal pay" (which includes severance pay) from unemployment compensation.

gued that certain provisions of the Massachusetts insurance laws were nevertheless preempted because they were not the kind of "traditional" insurance laws intended to fall within the insurance exception. This Court rejected that argument, noting that neither the ERISA statute nor its legislative history purported to draw any distinction traditional and innovative insurance laws. 105 S.Ct. at 2390. Similarly, we are aware of no basis in the ERISA statute or its legislative history for drawing any distinction between traditional and nontraditional unemployment compensation laws.

Accordingly, even if the definition of an employment benefit plan covered by ERISA could be stretched so far out of shape that it covered the Maine severance pay statute, the latter would still be saved from preemption under the exception for unemployment compensation laws. On this issue the cases relied upon by Fort Halifax support the State's position in that they find that severance pay is an unemployment benefit. *E.g., Gilbert v. Burlington Industries, Inc.*, 765 F.2d at 325. While preemption was found in *Gilbert*, the employee benefit plan at issue in that case was not established solely to comply with applicable state unemployment compensation laws. In this case, however, *if* the Maine severance pay law is somehow found to create an ERISA-covered employee benefit plan (a premise we do not accept for the reasons stated above), such a plan would exist solely to comply with 26 M.R.S.A. § 625-B. Since § 625-B is a form of unemployment com-

pensation law, it therefore escapes preemption under 29 U.S.C. § 1003(b)(3).[26]

III. The Maine Severance Pay Statute Is Not Preempted by the National Labor Relations Act

Fort Halifax and the Chamber of Commerce contend that the Maine severance pay law is also preempted by the National Labor Relations Act (NLRA). The United States, in contrast, concludes that this Court's decision in *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. at 2393-99, controls here and mandates the conclusion that the Maine severance pay law is not preempted by the NLRA. *See* Amicus Brief for the United States at 8-10 n.6. We agree with the United States.

Although the NLRA contains no express preemption provision, Fort Halifax bases its argument on a line of cases derived from *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), holding that states may not regulate the economic weapons available to combatants in labor disputes. *See, e.g., Machinists*, 427 U.S. at 140, 146-48; *Golden State Transit v. City of Los Angeles*, 106 S.Ct. 1395, 1399 (1986). Fort Halifax claims that Congress also intended that the substantive terms of collective bargaining agreements should be left

[26] In this connection, it bears emphasis that disability benefit laws are exempted by the same provision of ERISA that exempts unemployment compensation laws, and in considering the exemption for preemption for disability benefit laws, this Court has stated that "while a state may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan or including the state mandated benefits in its ERISA plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 108.

unregulated. Accordingly, it argues that since the severance pay law dictates certain terms of its employment relationship with its employees, the law is preempted by the NLRA.

This argument is foreclosed by *Metropolitan Life Insurance Co. v. Massachusetts*, which upheld state laws mandating inclusion of specified benefits in insurance policies purchased by employers. The import of the *Metropolitan* decision is that the NLRA does not preempt a state from imposing substantive employment terms on parties to labor agreements through laws setting minimum labor standards. *See* 105 S.Ct. at 2397-98. Like the Massachusetts statute at issue in *Metropolitan Life*, the Maine severance pay law is not addressed to the collective bargaining process. It merely requires that individual workers be given a specific benefit under certain circumstances. Moreover, unlike the state action at issue in such cases as *Machinists* and *Golden State Transit*, the Maine statute does not regulate the economic self-help weapons available to employers or employees under federal law. As a result, the Maine statute falls within the category of state legislation establishing "minimum labor standards" as that term is used in *Metropolitan Life*. *See* 105 S.Ct. at 2397.

While Fort Halifax contends that the severance pay law in fact interferes with the bargaining process because it strengthens the hand of the union during collective bargaining, the same can be said for any minimum labor standard that guarantees employees a benefit that they no longer need to seek at the bargaining table. Nevertheless, such minimum labor standards were upheld in *Metropolitan*

Life.[27] Similarly, while Fort Halifax argues that the Maine law is preempted because it prevents employers from implementing their last offer on the subject of severance pay if negotiations reach an impasse, the same is true for any state-imposed minimum labor standard. Simply stated, if states are permitted under the NLRA to adopt laws setting minimum labor standards, then employers cannot be free to implement offers which violate those minimum labor standards whenever there is an impasse in negotiations.

In fact, the Maine severance pay law is significantly less intrusive than many state minimum labor standards because it expressly preserves the freedom of employers and employees to contract on the subject of severance pay. 26 M.R.S.A. § 625-B(3)(B). Indeed, Fort Halifax entered into such a contract in November of 1981. Although this contract never took effect, its existence belies any suggestion that the Maine statute inevitably tilts negotiations on severance pay in favor of the union. (*See* Amicus Brief of

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[27] Fort Halifax argues that this case can be distinguished from *Metropolitan Life* because employers in *Metropolitan Life* retained the "unilateral" ability to avoid the coverage of the Massachusetts law by not agreeing to provide health coverage or by self-insuring. Since health coverage is a mandatory subject of collective bargaining, however, it cannot be unilaterally dropped by an employer. Thus, although the parties to a collective bargaining agreement in Massachusetts could drop health coverage by agreement, this is identical to the option to forego severance pay which exists under the "express contract" exception to the Maine severance pay law. Moreover, as this Court noted, the option of self-insurance is only available if the employer is in a financial position to make that choice. 105 S.Ct. at 2394. The *Metropolitan Life* opinion noted that the Supreme Judicial Court of Massachusetts had correctly found that an employer who purchased health insurance had "no choice" but to provide the mandated benefit. *Id.*

Chamber of Commerce at 18). Since the law thus defers to any severance pay contract reached between the parties, it does not "prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." *Teamsters v. Oliver,* 358 U.S. 283, 295 (1959). *See Baltimore v. Ohio Railroad Co. v. Commonwealth of Pennsylvania,* 461 Pa. 68, 334 A.2d 636, 640 (Pa. 1975), *appeal dismissed for want of a substantial federal question,* 423 U.S. 806 (1975).

Fort Halifax also seeks to derive support from NLRA § 8(d), 29 U.S.C. § 158(d), but that section merely provides that an employer is not obliged to agree to any particular contract term during the collective bargaining process. Neither that section—nor the corollary principle that the NLRB cannot require an employer to accept a specific contract term as a remedy for a § 8(d) violation, *see H. K. Porter Co. v. NLRB,* 397 U.S. 99 (1970)—prevents a state from regulating issues subject to collective bargaining by imposing terms on the employment relationship. *See Metropolitan Life,* 105 S.Ct. at 2394, 2397, 2398-99; *Malone v. White Motor Corp.,* 435 U.S. 497, 504-05 (1978).

In an attempt to distinguish *Metropolitan Life,* Fort Halifax claims that the Maine severance pay law does not apply equally to union and non-union employees. This is flatly incorrect. The severance pay law draws absolutely no distinction between union and non-union employees. As demonstrated by the instant case, where at least 10 non-union supervisors were awarded severance pay in the Superior Court judgment,[28] the severance pay statute re-

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[28] These ten are the "administrative employees" referred to in the Superior Court's May 2, 1985 decision. (J.S. App. A25).

quires that both union and non-union employees receive severance pay in the event of a major plant closing.

Fort Halifax apparently premises its claim that the law does not treat union and non-union workers alike on the theory that employers with non-union workers can "unilaterally" avoid their severance pay obligations under the "express contract" exception contained in 26 M.R.S.A. § 625-B(3)(B) and that the law therefore discriminates against unionized employers. We are not so sure that the "express contract" exception necessarily permits such unilateral action. However, the short answer to this claim is that a state law which is even-handed on its face does not become "discriminatory" because it can more easily be avoided in some circumstances than others. And to the extent that Fort Halifax's argument is premised on the truism that non-union employees generally have less bargaining power than union employees, this situation is not peculiar to the Maine severance pay law but applies to all employment-related issues.

Finally, Fort Halifax argues that the Maine severance pay law is not a valid exercise of police power. However, the severance pay law has twice been upheld by Maine's highest court as a valid exercise of police power aimed at the severe problems caused by major plant closings. *See* J.S. App. A11; ***Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.***, 320 A.2d at 254-55. This is plainly permitted by the NLRA, under which states retain "broad authority . . . to regulate the employment relationship to protect workers within the state." ***Metro-***

politan Life, 105 S.Ct. at 2398, quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).[29]

Thus, all of Fort Halifax's purported distinctions between this case and the principles laid down in ***Metropolitan Life*** are untenable, and accordingly it must be concluded that the Maine severance pay law is not preempted under the *Machinists* doctrine.[30] Indeed, the opposite con-

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[29] In part, Fort Halifax argues that the severance pay law is not a valid exercise of the police power because it has not been expressly authorized by Congress. (Appellant's Brief at 22-23). This was precisely the claim rejected in *Metropolitan Life*, where the appellants asserted that "state regulation is permissible only when Congress has authorized its enactment." 105 S.Ct. at 2395.

[30] In its amicus brief the Chamber of Commerce alternatively contends that the severance pay law is preempted under the NLRA preemption doctrine derived from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). (Amicus Brief at 23-26). Since no such argument is being made by Fort Halifax, the Court is free to disregard this issue. *See Knetsch v. United States*, 364 U.S. 361, 370 (1960). Moreover, this case is ineligible for preemption under *Garmon* in every conceivable respect.

First, *Garmon* does not apply to issues (1) which are of peripheral concern to the NLRA or (2) which touch state interests that are "deeply rooted in local feeling or responsibility." *E.g., Farmer v. Carpenters Local 25*, 430 U.S. 290, 296-97 (1977). The severance pay statute meets both these criteria. The sole concern of the NLRA is with the collective bargaining process, not the specific terms of the employment relationship. Any possible potential for interference with the NLRA is outweighed here by the state's substantial interest in protecting the health and well being of its citizens through the severance pay law.

Second, while the Chamber of Commerce argues that the employer has a protected right to implement its last best offer after an impasse, this is not conduct that is protected under section 7 of the NLRA but, at best, is merely conduct that is

(continued on following page)

clusion would mean that the NLRA preempts virtually all state regulation of collective bargaining issues. This is precisely the result sought by the Chamber of Commerce as amicus (*see* Amicus Brief at 22-23, 28). However, such an expansion of NLRA preemption would be squarely contrary to the prior decisions of this Court establishing that the NLRA does not preempt "all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining." *E.g., Malone v. White Motor Co.,*

(continued from previous page)

permitted under the NLRA. State regulation of such conduct is not preempted under *Garmon. See Belknap, Inc. v. Hale,* 463 U.S. 491 (1983). Indeed, this is true even where an employer's conduct is not just permitted, but arguably required, under the NLRA. *See id.* at 522 (Blackmun, J., concurring).

Third, an employer's right to implement its last best offer is in any event contingent upon the employer's having engaged in bargaining with the union and having reached impasse. *See NLRB v. Katz,* 369 U.S. 736 (1962). In the instant case, such a right is wholly hypothetical since there is nothing in the record to indicate that Fort Halifax ever (1) bargained with its employees over severance pay in connection with the May, 1981 cessation of operations, (2) reached an impasse on this subject, or (3) attempted to implement its last best offer. Whether a hypothetical employer who had implemented its last offer after reaching impasse would have a claim to preemption under *Garmon* need not be considered since none of the requisite facts are present here.

Finally, in cases involving conduct that is arguably protected under section 7, preemption is not called for under *Garmon* unless an unfair labor practice charge is actually filed with the NLRB. *Sears Roebuck & Co. v. San Diego District Council of Carpenters,* 436 U.S. 180, 202-03 (1978). Similarly, in cases involving conduct that is arguably prohibited under section 8, preemption is not appropriate unless the issues before the NLRB would be "identical" to those before the state court. *Id.* at 197. No unfair labor practice charge was ever filed in this case, and if such a charge had been filed, the issues before the NLRB would have been entirely different than those before the state courts.

435 U.S. at 504-05. *See Motor Coach Employees v. Lockridge,* 403 U.S. 274, 289 (1971).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed in all respects.

Respectfully submitted,

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
(Counsel of Record)
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
(207) 289-3661

Attorneys for Appellee
P. Daniel Coyne, Director
Bureau of Labor Standards,
Maine Department of Labor

January 30, 1987

APPENDIX A

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite

the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(14)

No. 86-341

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

P. DANIEL COYNE, Director Bureau of Labor Standards, Department of Labor

Appellee

and

FORT HALIFAX PACKING COMPANY, INC.

Appellant

—v.—

RAYMOND BOURGOIN, *et al.*

Appellees

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

APPELLANT'S REPLY BRIEF

JOHN C. YAVIS, JR.
(*Counsel of Record*)

THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone (203) 240-6000

Appellant's Attorneys

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ARGUMENT

1. ERISA Preempts the Maine Severance Pay Statute.

A. The Maine Law Relates To Employee Benefit Plans.

As recited in appellant's principal brief, ERISA preempts all state laws that have "a connection with or reference to" employee benefit plans. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97-98 (1983). There is no dispute here that severance pay is an "employee benefit" within ERISA's contemplation. Nor can it be questioned that the Maine severance pay statute requires certain employers to distribute this ERISA benefit according to a "plan": either by statutory formula or by privately-established substitute. Thus, ERISA preemption of the Maine severance pay statute is manifest and elementary.

Maine attempts to save its statute from preemption by arguing that it does not conflict with the substantive purposes of ERISA, such as preventing abuses in privately-administered plans. *See, e.g.*, Brief of Appellee at 11. Maine's narrow conception of ERISA's reach is erroneous. ERISA displaces all state laws that relate to employee benefit plans, "even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985). This broad preemption policy is designed to preclude litigation over the validity of state action arguably impinging upon Federal regulation and to prevent a multiplicity of conflicting state laws dealing with some aspect of welfare benefit plans—even if the state law is "not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29,942 (1974), *quoted in Shaw*, 463 U.S. at 99 n.20.

In addition to misstating Congressional intent, Maine distorts the statutory language. For example, Maine argues that there is no basis for finding preemption here because "the Maine severance pay statute does not relate to any existing ERISA-covered plan *in this case*." Brief of Appellee at 11 (emphasis added). But ERISA preempts "any and all State laws insofar

as they may now *or hereafter* relate to *any* employee benefit plan." 29 U.S.C. § 1144, ERISA Section 514 (emphasis added).

ERISA's preemption of a particular state statute, then, is not decided selectively on a case-by-case basis, measuring each employer's existing plan against the statute. Rather, the statute is void insofar as it relates to *any* employer's employee benefit plan—currently maintained or "hereafter" established in compliance with the state statute. Thus, in *Standard Oil Co. of California* v. *Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981), ERISA preempted the Hawaii statute not only "insofar as" it applied to plaintiff Standard Oil Company's employee benefit plan but "insofar as" it attempted to impose certain health benefits on employers—both those employers whose existing employee benefit plans would have been "altered or affected" and those who had no plans but who would be required to establish and maintain "plans envisioned by the Hawaii statute." 633 F.2d at 764.

Maine also argues that "the Maine statute does not require employers to maintain any plan because it expressly defers to any private severance pay agreement that may be reached between employer and employee." Brief of Appellee at 11. But, in fact, the statute does require employers to maintain a severance pay plan. They must "voluntarily" establish and maintain a plan or they must maintain the state-mandated plan. In either event, they must "maintain" an ERISA employee benefit plan. As *Agsalud* holds, ERISA forbids such state regulation.

Maine's alternative assertion that the connection between the Maine statute and ERISA plans is too remote or tenuous to justify preemption is frivolous. *Compare Gilbert* v. *Burlington Industries, Inc.,* 765 F.2d 320, 327 (2d Cir. 1985), *aff'd mem.,* 106 S. Ct. 3267 (1986) (state law regulating payment of severance benefits is not remote or tenuous) and *Stone & Webster Engineering Corp.* v. *Ilsley,* 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem.,* 463 U.S. 1220 (1983) (state law mandating continuation of benefits to employees receiving workers' compensation is not remote or tenuous) *with Rebaldo* v. *Cuomo,* 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied,* 105 S. Ct. 2702 (1985) (state regulation of private payor hospital rates too remote or tenuous to justify preemption) and *American Telephone & Telegraph* v. *Merry,* 592 F.2d 118, 121 (2d Cir. 1979) (garnishment of benefit plan income to enforce alimony and support orders too remote or tenuous to justify preemption).

Contrary to Maine's and the amici's suggestions, this case is not fundamentally different from *Agsalud.* A state may not impose an employee benefit plan upon employers. Because of the nature of the particular benefit involved in *Agsalud,* employers were required to attend to certain administrative details in maintaining the mandated plans. It is immaterial that similar administrative details are not required under the Maine statute. Severence pay is a benefit that, by its very nature, may not require extensive plan administration; it is quite often a one-time, lump sum payment. Nevertheless, where—as here—all of the incidents of a "plan" can be identified (*Donovan* v. *Dillingham,* 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)), and that "plan" is mandated by state law (*Standard Oil Co. of California* v. *Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981)), ERISA preemption is implicated. There is no support for Maine's statement that no ERISA plan exists because there is no trust providing an "ongoing benefit program." Brief of Appellee at 20-21. An ongoing program is not an essential plan element. *See Gilbert* v. *Burlington Industries, Inc.,* 765 F.2d 320 (2d Cir. 1985), *aff'd mem.,* 106 S. Ct. 3267 (1986); *Holland* v. *Burlington Industries, Inc.,* 772 F.2d 1140 (4th Cir. 1985), *aff'd mem., sub nom., Brooks* v. *Burlington Industries, Inc.,* 106 S. Ct. 3267 (1986).

The AFL-CIO concedes that *Donovan* correctly identifies the "basic attributes" of an ERISA plan and that the Maine statute expresses all of those attributes. Brief for AFL-CIO at 9. However, the AFL-CIO contends that the statutory "phrase 'estab-

lished or maintained by an employer' requires quite clearly that it is the *employer*, and not some third party, governmental or otherwise, that must subscribe to that scheme, and define its parameters." *Id.* at 11. *Agsalud* defies this statement. States may not "define the parameters" of a plan and then require employers to "subscribe" to it. Moreover, contrary to the assertion of Maine and the Employment Law Center, the severance pay statute does not create a state "administered" benefit. Other than creating the statutory benefit formula, Maine does not administer the severance benefit. Thus, in the ordinary case an employer that closes or relocates a covered establishment would be required to provide its employees a predetermined amount of severance pay, either in accordance with a private formula or the statutory formula, with no state involvement whatsoever. It is only when an employer does not provide severance benefits, either because it challenges the statute or because it lacks the necessary assets, that the state may *elect* to become involved.

Maine argues that preemption should not be found in this case because it would allow employers "who have no pension plan or employee benefit plan" to "take advantage of ERISA preemption to escape its obligations under the Maine severance pay law." Brief of Appellee at 26. This is a curious policy argument that begs the issue. ERISA precludes states from imposing an "obligation" on employers whether they have an existing plan or not. *See Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). Congress determined that states would not have authority to regulate in the field of employee benefit plans.

Maine also suggests that ERISA does not preempt state statutes with an otherwise valid purpose. Thus, Maine contradicts the severance pay statute's plain purpose in arguing that the severance pay statute is "not intended to regulate employee benefits *per se*." Brief of Appellee at 28. Apparently, Maine suggests that the regulation imposed upon employers is appropriate because it is not regulation for regulation's sake, but instead, "it constitutes Maine's attempt to respond to the specific problem of plant closings." *Id.* This state-police-power purpose does not save the Maine statute from ERISA preemption, any more than it saved the statutes in *Shaw* and *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See also Gilbert*, 765 F.2d at 327.

Finally, Maine states that Congress intended to regulate employee benefit plans, not employee benefits themselves. Brief of Appellee at 12. This is precisely the point addressed in Appellant's principal brief at 16-17. States may not mandate ERISA benefits. Congress left that decision in the hands of industry and labor. *Cf.* 120 Cong. Rec. 3981 (1974), "Employee Benefit Security Act of 1974; Material Explaining H.R. 12906 Together with Supplemental Views. To Accompany H.R. 2.", *reprinted in* Senate Committee on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act of 1974* ("Legis. Hist.") (1976) at 3305 ("fundamental aspect of present law" is voluntary establishment of retirement plans).[1]

B. The Maine Severance Pay Statute Is Not An "Unemployment Compensation Law".

Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), provides that Subchapter I of the act is inapplicable to employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment

[1]The amicus brief of The Employment Law Center contains a number of broad policy statements concerning the alleged impact, both nationally and in Maine, of plant closures. The statistical "facts" cited by amicus in support of these policy positions are not found in the record of this case. Furthermore, they are of questionable validity. For example, one cannot assume that the Maine law eases employment problems. The obligation created under the statute may well serve to discourage businesses from locating new business in Maine or from purchasing marginal operations in Maine. Moreover, whatever the merits of amicus' policy arguments, they do not override Congress' preemptive intent here.

compensation or disability insurance laws." Under ERISA Section 514(a), 29 U.S.C. § 1144, preemption does not apply to state laws that relate to plans exempt under Section 4(b)(3). Maine and its supporting *amici* assert that the severance pay statute constitutes an unemployment compensation law under Section 4(b)(3). Consequently, they argue that, since the severance plan imposed on Fort Halifax was maintained solely to comply with this law, the plan is exempt from Subchapter I of ERISA and the Maine statute is not preempted. This argument finds no support in ERISA's language, structure or legislative history.

i. ERISA's Language Specifically Distinguishes The Terms "Severance Pay Or Benefits" And "Unemployment Compensation Law".

This Court has recently stated: "In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state laws by so stating in express terms." *California Federal Savings & Loan Association* v. *Guerra*, 107 S. Ct. 683, 689 (1987) (citations omitted). Congress expressly included severance pay plans within ERISA's coverage. Section 3(1)(B) of ERISA, 29 U.S.C. § 1002(1)(B), includes benefits described in 29 U.S.C. 186(c) which in turn includes "severance or similar benefits". Section 3(2)(B), 29 U.S.C. § 1002(2)(B) authorizes the Secretary of Labor to issue regulations concerning "severance pay arrangements." It is inconceivable that Congress, after specifically including severance pay arrangements within ERISA's coverage in Sections 3(1)(B) and 3(2)(B) also meant to exclude severance pay by a reference to "unemployment compensation laws" in Section 4(b)(3). By the express language in ERISA, Congress considered "severance pay" to be different from "unemployment compensation laws."

ii. The State Of Maine Itself Considers The Severance Pay Law Not To Be Part Of Its Unemployment Compensation Law.

Maine, like every other state, has an unemployment compensation law. Maine's law, specifically entitled "Unemployment Compensation," was enacted pursuant to Title IX of the Social Security Act of 1935 and the Federal Unemployment Tax Act and is found in Chapter 13 of Title 26, Maine Revised Statutes. 26 M.R.S.A. § 1041 *et seq*. Under this law, an "Unemployment Compensation Fund", 26 M.R.S.A. § 1141, is created for the purpose of providing benefits to eligible "unemployed" individuals. 26 M.R.S.A. § 1192; 26 M.R.S.A. § 1043(17). In contrast, the Maine statute at issue in this case is entitled "Severance Pay", and is found in Subchapter II ("Wages and Medium of Payment") of Chapter 7 ("Employment Practices") of Title 26. If Maine had intended the law to constitute an "unemployment compensation law", one would expect to find it in the appropriate section of the Maine Revised Statutes. *Cf. Stone & Webster Engineering Corp.* v. *Ilsley*, 518 F. Supp. 1297, 1302 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983) (law located in general labor chapter was not a workmen's compensation law).

The reason the severance pay statute is not located within Maine's unemployment compensation laws is obvious; the statute does not link the severance pay obligation to unemployment. In fact, the words "unemployed" or "unemployment" cannot be found in the statute. Thus, an individual would receive the same severance benefit whether unemployed or not.

The fallacy of calling the severance pay law part of Maine's unemployment compensation law is further demonstrated by an analysis of the interaction of the two statutes. First, contrary to the disingenuous legislative history argument of the Maine Attorney General (Brief of Appellee at 31) and the assumption of the Employment Law Center (Brief for Employment Law

Center at 16 n.9), the Maine law does not disqualify an individual from receiving unemployment compensation benefits for each week of severance pay received. As Maine concedes (Brief of Appellee at 31 n.23), the Maine Bureau of Employment Security only disqualifies individuals during the specific week they actually receive severance pay. This result is mandated by an analysis of the unemployment compensation law's plain language. *See* 26 M.R.S.A. § 1043(17), 26 M.R.S.A. § 1043(19), 26 M.R.S.A. § 1193(5)(A). The Maine severance pay formula mandates the payment of all severance pay within one pay period after the employee's termination. 26 M.R.S.A. § 625-B(2). Therefore, the employee is ineligible for unemployment compensation only for that one week when the severance pay is provided, regardless of the amount. Clearly, severance pay under the Maine statute is not a substitute for unemployment compensation.

In addition, the Maine unemployment compensation law deals with the individual unemployed as a result of a plant shutdown. It provides that such an individual may be eligible for dislocated worker benefits while attending retraining programs (26 M.R.S.A. § 1191(4)(A), § 1196(1)(B)) and for extended unemployment compensation benefits. 26 M.R.S.A. § 1195. Thus, the argument that the severance pay statute is Maine's method of dealing with unemployment caused by plant shutdowns is misleading.

iii. The Term "Unemployment Compensation Law" Should Be Given Its Ordinary, Common-sense Meaning.

Despite the obvious conclusion that the severance pay statute is not part of Maine's unemployment compensation law, Maine and its supporting *amici* raise a number of arguments in their attempt to avoid preemption. The thrust of each argument is that Congress intended the term "unemployment compensation law" in section 4(b)(3) to encompass a wide range of state

laws as long as they have some connection with the possibility of unemployment. These arguments are all unpersuasive.

The term "unemployment compensation law" has an accepted, plain meaning. It is a law enacted pursuant to Title IX of the Social Security Act of 1935 and the Federal Unemployment Tax Act to provide benefits during periods of unemployment. This Court has consistently used the term "unemployment compensation law" when discussing laws under those statutes. *See, e.g., Wimberly* v. *Labor & Industry Council of Missouri*, 107 S. Ct. 821 (1987); *New York Telephone Company* v. *New York Labor Dept.*, 440 U.S. 519, 541 (1979) (plurality opinion); *Id.* at 557 & n.8 (Powell, J. dissenting); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 482-88 (1977); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 364 (1951). In fact, those statutes themselves refer to state "unemployment compensation laws" and set forth the criteria for approval of those laws. 42 U.S.C. § 501-504; 26 U.S.C. § 3301-3311.

There is no evidence that in referring to unemployment compensation laws in Section 4(b)(3) Congress intended to apply the term in other than its traditional, common-sense manner. There certainly is no evidence to suggest that Congress intended to give the term the radical meaning suggested by Maine.[3] In the absence of such evidence, it must be assumed that Congress intended to use the ordinary meaning. *See, e.g., Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). In fact, those federal courts discussing the term have considered it to

[3]As reported on and passed, both the House and Senate versions of ERISA exempted "workmen's compensation laws or unemployment compensation disability insurance laws." H.R. 2, 93d Cong., 1st Sess., § 101(b)(2) (1973), Legis Hist. at 2259; H.R. 2, 93d Cong., 2d Sess., § 101(b)(3) (1974), Legis. Hist. at 3918; S. 4, 93d Cong., 1st Sess., § 503 (1973), Legis. Hist. at 547-48; H.R. 4200, 93d Cong., 1st Sess., § 502(g)-(j) (1973), Legis. Hist. at 2032. In Conference the "or" between

(Footnote continued on following page)

apply in its traditional sense to state laws enacted as part of the Social Security system. *See Delta Air Lines* v. *Kramarsky*, 650 F.2d 1287, 1305 (2d Cir. 1981), *aff'd in part, rev'd in part sub nom. Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983); *Agsalud*, 633 F.2d at 764-65.

The AFL-CIO argues that Congress could not have intended the term "unemployment compensation law" to refer to laws enacted as part of the Social Security system because ERISA would not apply to plans created under these laws in the first instance. However, as the Second Circuit suggested in *Delta*, the conclusion that such plans would fall outside ERISA is not as clear as the AFL-CIO suggests. 650 F.2d at 1306. This would be particularly true for those employers that self-fund rather than contribute on a tax basis. *See, e.g.*, 26 M.R.S.A. § 1221(10). Thus, an exclusion for traditional unemployment compensation laws would not be redundant.

Citing *Metropolitan*, Maine and Employment Law Center argue that the term should be construed to encompass other types of laws in order to encourage state experimentation with novel forms of "unemployment compensation." *Metropolitan* is inapposite. First, the argument distorts the meaning of unemployment compensation instead of offering a broad definition. Second, *Metropolitan* interpreted section 514(b)(2), which provides an *exception* to ERISA *preemption*. Section 4(b)(3) involves an *exemption* from ERISA *coverage*. The implications of broadly construing exemptions from coverage are fundamentally different than the implications of broadly construing exceptions to preemption. Third, because there was no evidence suggesting that Congress intended otherwise, this Court provided the terms in Section 514(b)(2) their "common-sense" definition. *Metropolitan*, 471 U.S. at 739-47. Similarly, given the absence of evidence to suggest Congress intended otherwise, the terms in Section 4(b)(3) should be accorded their common-sense definition, which definition would not encompass the Maine law. *Id.; see also Shaw*, 463 U.S. at 96-97 (term "relate to" given "normal sense" meaning). Finally, the argument that broad State experimentation should be allowed in the employee benefit area was squarely and appropriately rejected by the Court of Appeals in *Agsalud*. 633 F.2d at 765.

(Footnote continued from previous page)

unemployment compensation and disability laws was inserted. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., § 4(b)(3) (1974), Legis. Hist. at 4291. This was done without explanation and without any indication that a change had been made. *Id.* at 255-56, 261, 296, 383, Legis. Hist. at 4522-23, 4530, 4563, 4650. It is worth noting, however, that the House Report to the original H.R. 2 and its substitute, H.R. 12906, both indicated that the change was intended by the House from the start. H.R. Rep. No. 533, 93d Cong., 1st Sess., 18 (1973), Legis. Hist. at 2365; 120 Cong. Rec. 3979 (1974), "Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together with Supplemental Views. To Accompany H.R. 2.", Legis. Hist. at 3297. Given the absence of any discussion on the subject, the legislative history lends no support to the attempt of Maine and its supporting amici to alter the plain meaning of the term "unemployment compensation law."

iv. The Term "Benefit In The Event Of . . . Unemployment" Is Not Synonymous With The Term "Unemployment Compensation Law".

In their attempt to broaden the definition of unemployment compensation laws, Maine and, to a greater extent, *amici* Employment Law Center and AFL-CIO also rely on the definition of employee welfare benefit plan in Section 3(1). They argue that since severance pay may be a "benefit provided in the event of . . . unemployment" under Section 3(1)(A), it should be deemed to be an "unemployment compensation law" under Section 4(b)(3). The AFL-CIO bolsters its argument for a broad definition by relying on legislative history to the Welfare and Pension Plan Disclosure Act ("WPPDA"). AFL-CIO Brief at 18.

These arguments are faulty for a number of reasons. First, the language in the two provisions is clearly different: "benefits in the event of unemployment" is a broad term with no ac-

cepted meaning; as shown above, "unemployment compensation law" is a specific term with an accepted meaning. In addition, the term "benefit in the event of unemployment" is located in Section 3, which defines plans *included* within ERISA's coverage. The term unemployment compensation law is in Section 4, which defines plans *excluded* from ERISA's coverage. These different terms, which perform fundamentally different functions in the same statute, should not be construed to be synonymous.

More importantly, a construction along the lines suggested by Maine would read Section 3(1)(B) out of the statute. Plans providing severance benefits are included within ERISA both as plans providing benefits in the event of unemployment under Section 3(1)(A) and as plans providing "severance benefits" under Section 3(1)(B). *See, e.g., Holland*, 772 F.2d at 1145; *Gilbert*, 765 F.2d at 325-26; *see also* 29 C.F.R. § 2510.3-1. Under the argument put forth by Maine, Congress intended to equate "benefits in the event of unemployment" with "unemployment compensation law." If this argument is correct, Congress would also have had to intend to include "severance benefits" within the definition of "unemployment compensation." Such a distortion of terms with accepted meanings cannot be presumed, and, given the complete absence of statutory language or legislative history to support it, this argument is pure presumption. *Cf. Metropolitan*, 471 U.S. at 742 (construction of statutory term that would violate plain meaning of language and render terms redundant "has little to recommend it").

The more elaborate argument of the AFL-CIO is ultimately just as unconvincing. For, while the AFL-CIO goes to great lengths to construct legislative history supporting a broad definition of the term "benefit in the event of unemployment" in Section 3(1)(A), it is unable to find any support whatsoever for attributing this broad definition to the term "unemployment compensation law" in Section 4(b)(3).

v. Conclusion.

In ERISA Congress used both the term "severance pay" and the term "unemployment compensation law". It must be presumed that Congress recognized that these terms have different meanings. For the last fifty years the term "unemployment compensation law" has had a specific, accepted meaning. There is no evidence to suggest that Congress did not intend to use that meaning in Section 4(b)(3). Nor is there any evidence to suggest that Congress meant to alter the term so radically as to encompass compensation to persons who are not deemed unemployed under a state's unemployment compensation law. Thus, the Maine statute, which is specifically entitled "Severance Pay", which is located outside the "Unemployment Compensation" Chapter of Title 26 of the Maine Revised Statutes and which is not directly linked in any way to unemployment, is not an unemployment compensation law within the meaning of ERISA Section 4(b)(3).

2. The NLRA Preempts the Maine Severance Pay Statute.

The parties to this appeal agree that the proper interpretation of *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985), controls the NLRA preemption aspect of this case. Fort Halifax reads *Metropolitan* as an exceptional case in the long line of *Machinists* NLRA preemption cases, turning principally upon the following factors: i) the Massachusetts statute established a *minimum* standard; ii) the state imposed the standard upon insurers rather than directly upon employers; iii) all employers could avoid the standard by declining to offer insurance coverage or by self-insuring; and iv) the statute involved insurance, a traditional bastion of state regulation. The State of Maine, on the other hand, reads *Metropolitan* not as an exception but as the case that swallows the *Machinists* rule.

The fundamental and critical distinction between this case and *Metropolitan* is that the Maine statute does not establish the requisite minimum standard that saved the Massachusetts statute. Even the appellee concedes that employers may contract to provide less than the benefit provided in the statute. *See* Brief of Appellee at 36. Nonunion employers, naturally, may do so unilaterally. Union employers, however, must get an agreement from the union. This feature provides unions with a bargaining chip and interferes with the bargaining process. Moreover, as the AFL-CIO concedes, after discharging its statutory duty to bargain in good faith, an employer is free under the NLRA to resort to the economic weapon of unilateral implementation of terms and conditions of employment. In Maine, however, the employer does not regain this right with respect to severance pay. Thus, unlike the statute in *Metropolitan*, which did not interfere in the bargaining process because it affected both union and nonunion employers equally, the Maine statute enhances the union's bargaining power and restricts the employer's right to use economic weapons.[3] *Metropolitan* does not sanction this interference with Federal labor law principles, and, for the reasons stated in appellant's principal brief, the NLRA preempts the Maine statute.

[3]The argument by the AFL-CIO that this scenario is "impossible to imagine" is frivolous. As the AFL-CIO should be aware, severance pay issues do not only arise prior to an imminent shutdown. As its own brief illustrates, these issues are frequently negotiated by ongoing companies. This is particularly true of multi-state employers desiring a uniform benefit package, either including or excluding severance pay.

CONCLUSION

For the foregoing reasons, and the reasons stated in appellant's principal brief, we respectfully request that the Court reverse the judgment of the Maine Supreme Judicial Court.

JOHN C. YAVIS, JR.
THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE

All of:

MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone: (203) 240-6000

Attorneys for Appellant

No. 86-341 (7)

IN THE

Supreme Court of the United States

October Term 1986

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

—against—

P. DANIEL COYNE, Director, Bureau of Labor Standards, Department of Labor,

Appellee.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

RICHARD G. MOON
(*Counsel of Record*)
LINDA D. MCGILL
JOHN H. RICH III
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza
P.O. Box 426
Portland, Maine 04112
(207) 774-2635
Counsel for Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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Questions Presented

1. Whether the Maine Severance Pay Law, which requires certain employers either to enter into an express contract providing for severance pay with certain employees or, in the absence of such an agreement, to pay the state mandated amount of severance pay, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

2. Whether the Maine Severance Pay Law is preempted by the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*

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Statement of Interest

The Chamber of Commerce of the United States of America (the Chamber) is a federation consisting of approximately 180,000 companies and several thousand state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, Congress and federal agencies. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation.[1] The Chamber submits this brief in support of Appellant Fort Halifax Packing Company, Inc.[2]

This case involves the State of Maine's requirement that employers with 100 or more employees in one location during a specified twelve-month period enter into express contracts with certain of their employees to pay severance pay to such employees or pay the state-mandated amount of severance pay upon a substantial cessation of the employer's business. The issues are whether Maine's law mandating severance pay (the Maine Severance Pay Law or Severance Pay Law) is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) regulating employee benefit plans and whether the Maine Severance Pay Law impermissibly interferes with the

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[1] *E.g.*, *Wisconsin Department of Labor and Industry* v. *Gould*, 106 S.Ct. 1057 (1986); *Pattern Makers League of North America* v. *NLRB*, 105 S.Ct. 3064 (1985); *Allis-Chalmers Corp.* v. *Lueck*, 105 S.Ct. 1904 (1985); *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

[2] Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the parties have consented to the Chamber's *Amicus Curiae* participation in this appeal. Their letters of consent are filed with this Brief.

federal labor scheme and protected rights declared in the National Labor Relations Act (NLRA).

These issues are of vital concern to the Chamber's members. Many members operate businesses in Maine and are directly affected by the Severance Pay Law. Moreover, the potential impact of the Severance Pay Law extends beyond Maine's borders. Because this Court's decision will significantly affect state and federal law in the areas of employee benefits and labor relations, the Chamber submits this brief to assist the Court in resolving this case.

Statement of the Case

Fort Halifax Packing Company, Inc. (Halifax), a wholly-owned subsidiary of Corbett Enterprises, Inc., operated a poultry processing and packaging plant in Winslow, Maine. (App. 22). On May 23, 1981, Halifax ceased operations and laid off more than 100 employees. At the time of the closing, many Halifax employees were represented by Local 385 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The existing collective bargaining agreement between Halifax and Local 385, effective June 2, 1979 to June 2, 1982, had no provision for severance pay. There was no contract or agreement covering severance pay between Halifax and its supervisory employees. (App. 2-3).

In September, 1981, Halifax officials believed that reopening the plant was possible. Accordingly, Halifax and Local 385 negotiated amendments to the collective bargaining agreement providing that Halifax would have no severance pay liability under the Maine Severance Pay Law if operations resumed. The plant did not reopen. (App. 3).

Halifax did not pay severance under the Maine Severance Pay Law. On October 30, 1981, eleven employees filed suit against Halifax in Kennebec County Superior Court seeking severance pay pursuant to Section 625-B(4) of the Maine

Severance Pay Law. The Director of the Maine Bureau of Labor Standards also commenced an enforcement action in Superior Court on behalf of all Halifax employees. (App. 3-4). The trial justice found Halifax liable for severance pay. (App. 42-43). Halifax appealed the decision to the Maine Supreme Judicial Court, urging, *inter alia,* that the Severance Pay Law was preempted by ERISA and the NLRA. The Chamber participated as *Amicus.*

On June 6, 1986, the Supreme Judicial Court issued a decision modifying the trial justice's calculation of severance pay to ten employees and affirming the judgment of the Superior Court in all other respects. (App. 1-20).

Summary of Argument

Through ERISA and the NLRA, Congress has sought to assure both the protection of employee benefits promised by employers and the ability of employees voluntarily to organize and negotiate for such benefits. The Chamber believes that affirmance of the decision of the Maine Supreme Judicial Court in this case would not only be contrary to this Court's prior decisions concerning the preemptive sweep of ERISA and the NLRA, but would nullify Congress' efforts to achieve uniform federal policy in the areas of employee benefits and collective bargaining. Disruption of the nation's well-established labor policies would place a costly burden on the nation's employers, to the ultimate detriment of employees. The Chamber urges that the Maine Severance Pay Law be held preempted on the bases summarized below.

A. ERISA Preemption.

Under the plain language of ERISA, as well as the decisions of this Court, it is settled that a state may not pass a law which relates to, that is, has a connection with or reference to, a severance pay plan. The Severance Pay Law does far more than relate to a severance pay plan. It directly regulates such plans

by (1) nullifying plans which are neither express nor created by contract, but are nevertheless ERISA plans, and (2) in the absence of an express contract, establishing the state's own plan under ERISA, specifying the amount of severance pay, the class of beneficiaries and the procedures for distribution. Contrary to Appellee's position, the Severance Pay Law is not within ERISA's exception for unemployment compensation insurance laws, since the Severance Pay Law has no relationship to that well-recognized system. Instead, the Severance Pay Law is precisely the kind of regulation which, unless invalidated by this Court, will permit a state to require an employer to have any kind of benefit plan the state chooses, undoing the uniform and consistent regulation of employee welfare benefits which was the core of Congress' intent in enacting ERISA.

B. NLRA Preemption.

The Maine Severance Pay Law affects and was intended to affect the balance of power in collective bargaining. It provides employees a benefit to use as a bargaining chip in negotiations and precludes an employer from exercising certain protected rights. Accordingly, the Severance Pay Law is preempted by both doctrines of federal labor law preemption developed by this Court.

First, the Severance Pay Law affects the collective bargaining process by tipping the balance of power because it imposes economic consequences on the employer, but not on employees, if no express contract for severance pay results from negotiations. The effect of the Severance Pay Law is to force on the employer an express contract on a mandatory subject of bargaining, even though such an agreement cannot be compelled, and can be resisted absolutely, under the NLRA. The Severance Pay Law is not protected by *Metropolitan Life Insurance Co.* v. *Massachusetts,* 105 S. Ct. 2380 (1985). Unlike the Massachusetts insurance regulation at issue in *Metropolitan,* the Severance Pay Law gives the employer no choice: the employer must expressly contract for the benefit or face the mandatory state payment. The Severance Pay Law does not establish a minimum standard for benefits and is not the kind of regulation tolerated by Congress as part of the historical context of the NLRA.

Secondly, the Severance Pay Law eviscerates the employer's protected right and economic weapon of implementing after *bona fide* impasse its last, best offer on severance pay. The Severance Pay Law also thrusts the state court into the determination of an employer's obligation to its unionized employees in the context of a plant closing, an area exclusively and extensively regulated by the National Labor Relations Board (NLRB), or alternatively into the area preempted by Section 301 of the Labor Management Relations Act. By attempting to impose a different and conflicting remedy than does the NLRA for an employer's refusal to contract for severance pay, the Severance Pay Law interferes directly with the scheme chosen by Congress for regulating labor management relations.

The Court should hold preempted the Maine Severance Pay Law to effectuate the letter and intent of ERISA and the NLRA. Maine and other states will remain free to remedy the economic and social disruption of business terminations by any method which does not eviscerate federal law.

ARGUMENT

I. The Maine Severance Pay Law Is Preempted By The Employee Retirement Income Security Act.

A. Severance Pay is a Welfare Benefit Covered by ERISA.

In the wake of this Court's decisions in *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S.Ct. 3267 (1986) and *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), it is

settled that severance pay is a welfare benefit under ERISA, and any plan, fund, or program providing for severance pay is an ERISA-covered plan. Two separate rationales compel this conclusion. On the one hand, severance pay assists employees during the unemployment that follows job termination and as such is a "benefit[ ] in the event of . . . unemployment" within the definition of employee welfare benefit plan in Section 3 (1)(A) of ERISA, 29 U.S.C. §1002(1)(A). *Holland,* 772 F.2d at 1145.[3] So too, severance pay falls within the ambit of Section 3(1)(B), 29 U.S.C. §1002(1)(B), which incorporates by reference the "pooled vacation, holiday, *severance* or similar benefits" described in Section 302(c) of the Labor Management Relations Act, 29 U.S.C. §186(c) (emphasis added). *Id.*[4] Thus, under the ordinary meaning of the language of the statute, as well as unanimous case law, it is indisputable that a severance pay plan is an employee welfare benefit plan governed by ERISA. Confronted with this unassailable proposition, Appellee argues that the Maine Severance Pay Law is saved from ERISA preemption because it does not "relate to" an ERISA-covered welfare benefit plan, or, if it does, it is saved from preemption by the exception in ERISA for unemployment compensation insurance laws. These arguments are unsupportable.

[3]*Accord Gilbert,* 765 F.2d at 325; *Jung* v. *FMC Corp.,* 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Sly* v. *P.R. Mallory & Co.,* 712 F.2d 1209, 1211 (7th Cir. 1983); *Petrella* v. *NL Industries, Inc.,* 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an "unemployment' benefit.").

[4]*Accord Blakeman* v. *Mead Containers,* 779 F.2d 1146, 1149 (6th Cir. 1985); *Gilbert,* 765 F.2d at 325; *Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499, 1502 (9th Cir. 1985); *Sly,* 712 F.2d at 1210-11; *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982) (*en banc*); *Dependahl* v. *Falstaff Brewing Corp.,* 491 F.Supp. 1188, 1196 (E.D. Mo. 1980), *aff'd in relevant part,* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981).

B. The Maine Severance Pay Law "Relates to" an ERISA-covered Employee Welfare Benefit Plan.

Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Indeed, this Court has held that "[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts,* 105 S.Ct. at 2389. In defining ERISA's preemptive sphere, this Court has given the statute a broad reading: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.,* 463 U.S. 85, 96-97 (1983).

Ignoring the broad construction that must be given ERISA's preemptive sweep, Appellee's entire defense of the Maine Severance Pay Law rests on the narrow argument that since Fort Halifax did not maintain a severance pay plan, the Maine Severance Pay Law could not relate to such a plan. This facile approach is wrong. It ignores that the Maine Severance Pay Law not only "relates to" but in fact establishes an ERISA-covered plan. Moreover, the conflict with ERISA is direct because any number of ERISA-covered plans maintained by employers would not be recognized by the Maine Severance Pay Law.

1. The Maine Severance Pay Law Establishes an ERISA-Covered Plan.

By mandating that a covered employer have an "express contract" providing for severance pay, 26 M.R.S.A. § 625-B(3)(B) the Maine Severance Pay Law could not have a more direct "connection with or reference to" an ERISA-covered severance pay plan. The question of when severance pay benefits constitute an ERISA-covered plan was carefully considered in

Donovan, 688 F.2d 1367, wherein the Eleventh Circuit, sitting *en banc,* formulated a persuasive test: "[A] 'plan, fund or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan,* 688 F.2d at 1373.[5] In the case of the Maine Severance Pay Law, the intended benefits are severance pay at the rate of one week's pay for each year of employment, 26 M.R.S.A. §625-B(2); the class of beneficiaries are employees of three years or more, 26 M.R.S.A. §625-B (3)(D); the source of financing is simply the employer's general assets;[6] and the procedure for receiving benefits is provided, including in the event of non-payment, suits by employees, 26 M.R.S.A. §625-B(4), or enforcement suits by the Director of the Maine Bureau of Labor, 26 M.R.S.A. §625-B(5).

Just as clear is the fact that such a state-mandated plan is impermissible. *Standard Oil Co. of California* v. *Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981), establishes that a state may not mandate creation of an ERISA welfare benefit plan.[7] As the court in *Agsalud* recognized, re-

[5]*Accord Scott,* 754 F.2d at 1503-04; *Molyneux* v. *Arthur Guinness & Sons,* 616 F.Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.,* 567 F.Supp. 1258, 1267 (N.D. Ala. 1983).

[6]Any argument that the State-imposed severance pay plan would not be covered by ERISA because it is not specifically funded has been finally laid to rest. *See Holland,* 772 F.2d at 1145 ("We also reject the Commissioner's contention that Burlington's severance pay plan is not within ERISA because it is not specially funded."); *accord Gilbert,* 765 F.2d at 325-26 (unfunded severance pay policy included within ERISA's definition of employee welfare benefit plan); *Scott,* 754 F.2d at 1502 (Department of Labor regulation promulgated under ERISA "does not limit the definition to those severance benefits which are pooled or which are funded by a trust fund.").

[7]*Accord Stone & Webster Engineering Corp.* v. *Isley,* 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi* v. *Stone & Webster Engineering,* 463 U.S. 1220 (1983).

quiring an employer to have an ERISA-covered plan or to be subject to Maine's own welfare benefit plan is "relating to" an existing welfare benefit plan. If not, any employer without an ERISA-covered plan of whatever kind—be it a pension plan, a health plan, an accident plan, *or* a severance pay plan—could be required by any state to have such a plan or to pay a state-mandated amount.[8] As this Court has repeatedly stated, "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan,* 105 S.Ct. at 2388. If Congress had intended to permit a state-mandated pension or welfare benefit

[8]Two fatal infirmities are brought to light by that scenario. First, as noted in *Holland, supra,* ERISA's broad preemption of state laws furthers a major policy objective: uniformity in employee benefit laws. According to the Court in *Holland,* Congress realized that myriad state regulations of employee benefit plans had become a major concern to employers with plants, divisions, or employees scattered in numerous states, and a broad preemption provision was an integral part of ERISA's response. *Holland,* 772 F.2d at 1147, citing *Shaw,* 463 U.S. at 99.

> Any hope of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result.

Holland, 772 F.2d at 1147 n.5.

In addition, as this Court has observed, ERISA does not mandate that employers provide any particular benefit. *Shaw,* 463 U.S. at 91; *see also Blau* v. *Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 183 (1986) ("ERISA mandates no minimum substantive content for employee welfare benefit plans."); *Sutton* v. *Weirton Steel,* 567 F.Supp. 1184, 1195 (N.D.W. Va), *aff'd,* 724 F.2d 406 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984) ("ERISA does not require an employer to offer any type of benefit."). The Maine Severance Pay Law then clashes head-on with ERISA's policy of not requiring employers to establish any particular welfare benefit plan.

plan, where the affected employer did not have such a plan, Congress could certainly have done so. The omission from the specific exceptions to ERISA's broad preemptive language of the exception asserted by Appellee is further proof of Congress' clearly stated intent to assure uniformity of pension and welfare benefit plan treatment.[9]

2. The Maine Severance Pay Law Conflicts Directly with ERISA.

Quite contrary to Appellee's suggestion that the parties do "not argue that there is any conflict between ERISA and the Maine Severance Pay Law," Motion to Dismiss or Affirm at 5, the conflict between the two laws is glaring. Just two of many possible scenarios make this clear. The first example is the Burlington severance pay plan recognized by this Court in *Holland* and *Gilbert* as covered by ERISA. Not only would such plans be invalid in Maine under the Severance Pay Law, they would be replaced by the severance pay plan contained in the Maine Severance Pay Law.

In both *Holland* and *Gilbert*, the severance pay provision of Burlington Industries was set forth only in its Policy Manual and its Salaried Employee Handbook. The Burlington program provided for disqualification for narrow reasons, the determination of which was left to the company's discretion as long as it did not act arbitrarily or capriciously. Crucially, in each case the Circuit Court recognized that a unilateral statement of intent to pay severance pay, with no trustee, trust fund or filing with the Department of Labor, constitutes an ERISA-covered plan. *Holland*, 772 F.2d at 1144-1145; *Gilbert*, 765 F.2d at 324-326. Since the Maine Severance Pay Law exempts from its requirements only those severance pay arrangements which are

[9]As Representative Dent, one of ERISA's sponsors, noted: "With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation." 120 Cong. Rec. 29197 (1974).

created by an "express contract," 26 M.R.S.A. §625-B(3)(B), Burlington's ERISA-covered plan would *not* be recognized. Under the Maine Supreme Judicial Court's decision below, Burlington would be required to comply with the Severance Pay Law.

As the Burlington example illustrates, the effect of the Maine Severance Pay Law is to invalidate or supplement a plan which is within the scope of ERISA. No law can have a more direct "reference or connection" with an ERISA-covered benefit plan than the Maine Severance Pay Law. The Maine Supreme Judicial Court's conclusion to the contrary is in direct conflict with this Court's decisions. Indeed at footnote 9 of its opinion (App. 9), the Maine Supreme Judicial Court implicity acknowledges the conflict, underscoring the need for this Court to state that the Maine Severance Pay Law does relate to ERISA benefit plans and is preempted.[10]

While the Burlington example alone eliminates the plausibility of arguing that the Severance Pay Law does not relate to ERISA-

[10]A long line of cases follows *Holland* and *Gilbert* and stands uniformly for the proposition that a voluntary, unilateral declaration of severance pay benefits by an employer, with no employee participation in the development of the plan, much less an "express contract" for such benefits with the employees, constitutes an employee welfare benefit plan which is covered by ERISA. *See Barry* v. *Dymo Graphics Systems, Inc.*, 478 N.E. 2d 707 (Mass. 1985) (voluntary obligation in personnel policies); *Blau*, 748 F.2d at 1352 (voluntary undisclosed plan); *Donovan*, 688 F.2d at 1372 (no formal, written plan required); *Jung*, 755 F.2d at 709 (voluntary unilateral plan for salaried personnel); *Petrella*, 529 F.Supp. at 1362 (severance pay by tradition, not even disclosed in writing to employees, and purely discretionary); *Sly*, 712 F.2d at 1210 (unilateral policy statement); *Dependahl*, 491 F.Supp. at 1190 (unilateral severance pay policy in policy manual); *Pinto* v. *Zenith Radio Corp.*, 480 F. Supp. 361, 362 (N.D. Ill. 1979) (unilateral corporate statement); *Donnelly* v. *Aetna Life Insurance Co.*, 465 F. Supp. 696 (E.D. Pa. 1979) (unilateral statement in personnel manual that plaintiffs never saw). None of these ERISA-covered plans involved an "express contract." Accordingly, none would mitigate the mandatory pay-out in the Severance Pay Law, and the State's mandated amount would replace such ERISA-covered plans.

covered welfare benefit plans, a second scenario renders Appellee's argument indefensible. The example hypothesizes an employer subject to the Severance Pay Law, who voluntarily elects to create a severance pay plan, files it with the U.S. Department of Labor, establishes a claims procedure, describes the plan in its handbook and distributes a summary plan description to covered employees, all in compliance with ERSIA regulations. Even that ERISA-covered plan is invalidated by Maine's Severance Pay Law, because there is not the "express contract" required by the Severance Pay Law.

In an attempt to avoid this direct conflict between ERISA and the Severance Pay Law, Appellee may suggest that unilateral employer action satisfies the requirement of an express contract. Appellee then would be conceding that whatever amount of severance pay, including zero, an employer wished to declare would exempt the employer from the mandatory pay provision of the Maine Severance Pay Law. Heretofore Appellee consistently has refused to take that position. Indeed, the language of the Severance Pay Law requiring "an express contract providing for severance pay" cannot logically be read to encompass that position. If an employer could unilaterally create, amend, or reduce to zero its severance pay plan, the Severance Pay Law would be meaningless. Appellee's dilemma of course is that only this reading of the Severance Pay Law avoids a direct conflict with ERISA's preemption provisions.[11]

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[11]Similarly, Appellee's suggestion in its Motion to Dismiss, at 8 n.5, that the parties could "contract" to eliminate severance pay benefits is meaningless. Employees could simply refuse to agree to no severance pay, or to any amount less than that provided by the Maine Severance Pay Law, and have the state-mandated amount apply automatically. Additionally, a contract for no severance pay is contrary to the fundamental intent of the Severance Pay Law to "alleviate the adverse economic impact upon the employees and the community in which they live". Statement of Fact, Maine Revised Statutes, Chapter 452 (1971).

In sum, the Maine Severance Pay Law renders ERISA's preemption provisions invalid and its goal of uniformity of regulation meaningless. This outcome is in direct conflict with Congressional intent and with this Court's repeated holdings on the effect of ERISA preemption.

C. The Maine Severance Pay Law Is Not An "Unemployment Compensation" Law Excepted by 29 U.S.C. §1003(b)(3).

This Court has previously noted that "[t]he only relevant state laws, or portions thereof, that survive [ERISA's] preemption provision are those relating to plans that are themselves exempted from ERISA's scope." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981). Section 4 of ERISA provides in part that ERISA "shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . insurance laws. . . ." 29 U.S.C. §1003(b)(3). Appellee suggests that Section 4 can be construed as a saving clause permitting the Maine Severance Pay Law. Motion to Dismiss or Affirm at 12 n. 8. In doing so, Appellee ignores the settled meaning of the phrase "unemployment compensation insurance law."

Since 1935, Sections 301 through 303 of the Social Security Act, 42 U.S.C. §§ 501-503, have provided a distinct statutory scheme "for the purpose of assisting the States in the administration of their *unemployment compensation laws. . . .*" 42 U.S.C. §501 (emphasis added). Pursuant to this federal scheme, Maine has enacted its own detailed laws governing unemployment compensation. *See* 26 M.R.S.A. §1041 *et seq.* Under such laws, employers in Maine are required to pay into a state-maintained fund, from which benefits are paid, with employer assessments for additional or increased payments to the fund based upon the employer's individual unemployment experience rating, precisely in the form of an insurance fund. The Maine Severance Pay Law plays no role in Maine's detailed

unemployment compensation insurance laws. When Congress listed plans required solely to comply with state unemployment compensation insurance laws as an exception to the broad preemption of ERISA, Congress was clearly aware of the well-established body of state unemployment compensation insurance laws then existing, and the interrelationship between such laws and related federal laws such as the Social Security Act and the Internal Revenue Code.

Indeed, the conclusion that the unemployment compensation insurance laws excepted from ERISA in 29 U.S.C. §1003(b)(3) must be narrowly defined is supported in ERISA itself.[12] The statutory section immediately preceding 29 U.S.C. §1003 provides that: "The term[ ] 'employee welfare benefit plan' mean[s] any plan, fund, or program . . . established or maintained . . . for the purpose of providing . . . (A) . . . benefits in the event of . . . *unemployment*. . . ." 29 U.S.C. §1002(1) (emphasis added). If, as Appellee suggests, the unemployment compensation exception in ERISA governs any termination of employment, the provision of 29 U.S.C. §1002(1)(A), which provides that plans established to provide benefits for unemployment are ERISA-covered employee welfare benefit plans, is vitiated. In addition, Appellee's assertion is directly rejected by the unanimous line of cases, cited at footnote 3 above, which holds that precisely because severance pay is a benefit in the event of unemployment, severance pay is an employee welfare benefit plan covered by ERISA.

If Appellee's definition of unemployment compensation insurance were adopted, the 29 U.S.C. §1003(b)(3) exception to ERISA preemption would swallow the rule. The tautology—that severance pay lessens the hardship of unemployment and therefore severance pay is "unemployment compensation"—is

[12]This Court has previously underscored the "narrow exceptions" carved out by Congress in ERISA. *Shaw*, 463 U.S. at 105. *See also* 120 Cong. Rec. 29197, 29933.

overbroad. Without the clearly stated intent of Congress, indeed contrary to Congress' stated intentions to cover benefits for unemployment, there is no basis to alter the ordinary meaning of unemployment compensation insurance laws. By departing from the customary meaning of unemployment compensation, Appellee's argument leads to the conclusion that since retirement benefits lessen the hardship of an end to employment, pension benefits also constitute unemployment compensation. Taken to its logical extension, it would allow any state total freedom in mandating any benefit, including pensions. This flies in the face of the purpose of ERISA and should be rejected.

II. The Maine Severance Pay Law Is Preempted By The National Labor Relations Act.

A. Overview of NLRA Preemption.

In drawing the boundaries of federal labor law preemption, this Court has developed two distinct branches of analysis. The so-called free play branch, articulated in *Lodge 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Commissions,* 427 U.S. 132 (1976), precludes state regulation of areas which intentionally have been left by Congress "to be controlled by the free play of economic forces" between employers and employee organizations. *Machinists,* 427 U.S. at 140, quoting *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138, 144 (1971). In recent years the Court has entertained a steady flow of cases raising "free play" preemption claims. The Court's expression of the free play doctrine has varied somewhat depending on the facts at bar, the clarity of Congressional intent to allow state regulation on the issue, and the unanimity of the Justices. Nevertheless, the litmus test for "free play" preemption has remained constant. If a state or local regulation tips the balance of bargaining power toward one side or the other to a degree not countenanced by Congress,

it is preempted. *Machinists,* 427 U.S. at 153; *Teamsters Local 20* v. *Morton,* 377 U.S. 252 (1964); *New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519; *Metropolitan Life Insurance Company* v. *Massachusetts,* 105 S.Ct. 2380; *Golden State Transit Corporation* v. *City of Los Angeles,* 106 S.Ct. 1395 (1986); *Wisconsin Department of Industry* v. *Gould,* 106 S.Ct. 1057. *See also* Cox, *Recent Developments in Federal Labor Law Preemption,* 41 Ohio State L.J. 277, 292, 294-95 (1980). This test controls regardless of the form of regulation (state labor board injunction, *Machinists,* 427 U.S. 132; exercise of a traditional local function, *Golden State Transit Corporation* v. *City of Los Angeles,* 106 S.Ct. 1395; state court judgment, *Teamsters* v. *Morton,* 377 U.S. 252; state legislation, *New York Telephone* v. *New York State Department of Labor,* 440 U.S. 519; state's spending decisions, *Wisconsin Department of Industry* v. *Gould, Inc.,* 106 S.Ct. 1057) or whether the regulation is one which applies to the general public or operates specifically on employers, employees and unions.

Under the second preemption doctrine, the states must yield exclusive jurisdiction to the NLRB whenever the conduct that the state seeks to regulate is subject to NLRB jurisdiction and is protected, prohibited or arguably protected or prohibited by the NLRA. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959). The Garmon doctrine "is intended to preclude state interference with the NLRB's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corporation* v. *City of Los Angeles,* 106 S.Ct. at 1398, quoting *Wisconsin Department of Industry* v. *Gould,* 106 S.Ct. at 1062.

B. The Maine Severance Pay Law Is Preempted Under the "Free Play" Doctrine.

1. The Severance Pay Law Impermissibly Intrudes Into the Bargaining Process.

The process of collective bargaining is the primary concern of the NLRA. *Metropolitan,* 105 S.Ct. at 2395, 2396. *See also New York Telephone Company* v. *New York State Department of Labor,* 440 U.S. at 551 (Powell, J., dissenting). As envisioned by Congress, bargaining must occur in an atmosphere of equality. *Metropolitan,* 105 S.Ct. at 2395; *Golden State Transit Corporation* v. *City of Los Angeles,* 106 S.Ct. at 1400. A state cannot " 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees." *Machinists,* 427 U.S. at 147.

The Maine Severance Pay Law prevents the process of collective bargaining from operating with the balance and equality decreed by Congress. Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.,* 350 F.2d 191, 196 (3d Cir. 1965); *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666, 678, n.15 (1981). Indeed, in negotiations triggered by an employer's decision to terminate or relocate its operation, severance pay is often the crucial issue. The union typically proposes a high amount of severance; the employer counters with a lower amount or even zero. In the framework of unfettered collective bargaining under the NLRA, each party is then free to wrest concessions in exchange for its agreement to the other's proposal, to insist on its own proposal, or to refuse to agree at all. In the absence of intrusive state regution, bargaining proceeds as Congress intended: between parties who are equally positioned, are under no compulsion to agree to the other's demands, and are free to use the full panoply of economic weapons at their disposal to achieve voluntary agreement. *Golden State Transit Corporation* v. *City of Los Angeles,* 106 S.Ct. at 1400; *First National Maintenance Corp.* v. *NLRB,* 452 U.S. at 670.

An employer subject to the Maine Severance Pay Law has no equality of bargaining position. The employer comes to the bargaining table needing an express agreement on severance pay to escape the substantial payment otherwise required by the Severance Pay Law. The union has no incentive to enter into such an agreement or to make concessions to achieve its own position on severance pay, since in the absence of an express agreement, severance liability will nevertheless be imposed on the employer. The Severance Pay Law gives the union a bargaining chip which inevitably tilts negotiations on severance pay in favor of the union. The effect is to undo the Congressional decision to send the parties to the bargaining table with equivalent power.

In levying economic consequences on the employer for failing to achieve an express contract, the State is attempting both to aid the party which the State judges to be the weaker and to impose its own solution to the parties' bargaining stand-off. This Court has consistently held that state action which has this effect is preempted. "Even though agreement is sometimes impossible, the government may not step in and become a party to the negotiations." *Golden State Transit*, 106 S.Ct. at 1401. Not even the NLRB, with its broad remedial authority, can compel either party to reach agreement on a mandatory subject or burden one side more than the other for the failure to agree after good faith bargaining. *H.K. Porter and Co.* v. *NLRB*, 397 U.S. 99 (1970). Maine may not attempt to achieve the same result.

2. The Severance Pay Law Deprives the Employer From Resorting to the Legitimate Weapon of Unilaterally Implementing Its Last, Best Offer on Severance Pay.

In addition to tipping the balance of power in actual negotiations, the Severance Pay Law interferes with the employer's ability to further its bargaining position by implementing unilaterally its last, best offer after a bargaining impasse has been reached. Unilateral implementation is a legitimate economic

weapon under the NLRA, just as is a strike or lock-out. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *Reed & Prince Mfg. Co.* v. *NLRB*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U. S. 887 (1953). The State may not impede its use any more than it could prohibit peaceful recognitional picketing, *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), a secondary boycott, *Teamsters* v. *Morton*, 337 U.S. 252, or a concerted refusal to work overtime, *Machinists*, 427 U.S. 132. Nor may the State restrict an employer's weapons more than a union's. *Golden State Transit*, 106 S.Ct. at 1401.

Applying the employer's protected right of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement its no severance pay offer. Like other employer self-help measures, the economic pressure generated by unilateral implementation would be an incentive to the union to return to the bargaining table, to curtail its own economic weapons, or to make other concessions.

Yet a Maine employer subject to the Severance Pay Law can wield no economic pressure by unilateral implementation of its severance pay offer. Without an express contract, the employer is subject to severance pay liability. The Severance Pay Law effectively eliminates this federally-sanctioned weapon from the employer's economic arsenal.[13] Under this Court's consistent decisions protecting the free use of economic weapons by either

[13]Appellant interprets the Severance Pay Law to permit an employer to establish an express contract for severance pay by unilateral declaration. Jurisdictional Statement at 12. If this view is correct, the Severance Pay Law encourages collective bargaining and operates unequally on unionized and non-unionized employees. A unionized employer may not act unilaterally under the NLRA; a non-unionized employer would have no constraint. A state law that encourages collective bargaining, or that penalizes an employee's right to refrain from union activities, is invalid. *Metropolitan Life Insurance Company* v. *Massachusetts*, 105 S.Ct. at 2398.

party to enhance its bargaining position, and rejecting state attempts to limit those economic weapons, the Maine Severance Pay Law is preempted.

C. The Maine Severance Pay Law is Not Protected under Metropolitan Life Insurance Company v. Massachusetts.

Metropolitan Life Insurance Company v. *Massachusetts,* 105 S.Ct. 2380, does not control this case, except as it affirms that equality of bargaining power is the centerpiece of the NLRA.

The issue in *Metropolitan* was a narrow one: whether a state insurance regulation that does not alter the balance of bargaining is the kind of interference with the goals of federal labor law which is forbidden by the NLRA. The dispositive difference between *Metropolitan* and this case is that the Severance Pay Law indisputably tips the balance of bargaining. Unlike the Massachusetts statute, which leaves the parties free to purchase the benefit or not, *Metropolitan,* 105 S.Ct at 2394, the Severance Pay Law gives the employer no choice. The failure to negotiate an express contract for severance pay subjects the employer to payment by law. By compelling agreement on a critical bargaining term, Maine has acted more like Los Angeles in *Golden State Transit,* 106 S.Ct. 1395, than like Massachusetts in *Metropolitan.*

In further distinction from the regulation at issue in *Metropolitan,* the Severance Pay Law does not mandate any minimum benefit. The Severance Pay Law applies only to large employers and to certain categories of employees. It permits a covered employer to make any severance pay contract whatsoever with covered employees or their bargaining representatives, arguably even for zero severance benefits. Indeed, the Severance Pay Law does not require uniform or minimum severance benefits even among covered employees in the same establishment.

Rather than setting a "specific minimum protection" for individual workers, *Metropolitan,* 105 S.Ct. at 2397, quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 739 (1981), the Severance Pay Law attempts to set the method by which covered employers and employees reach accommodation on the issue of severance pay during a plant closing. The method which the State favors—an expres contract between employers and employees—is incompatible with the process of free collective bargaining chosen by Congress to accommodate the parties' interests on the same subject. The Severance Pay Law affects not only the result but the very process of bargaining, which this Court affirmed in *Metropolitan* is the foundation of federal labor law.

The Severance Pay Law is not one of the historical areas of state regulation which Congress intended to tolerate when it enacted the NLRA. Nor is it a law of general applicability. *cf. Metropolitan,* 105 S.Ct. at 2395-2396. *See also New York Telephone Company* v. *New York State Department of Labor,* 440 U.S. 519, 564. The Severance Pay Law operates directly on employers and employees rather than on the broader public. Indeed, adjustment of the relative strength between labor and management was the purpose of the Severance Pay Law. In legislative debates leading to initial enactment in 1971,[14] State Representative Bustin of the Labor Committee stated:

> It is often said that labor has no rights unless they are negotiated at the bargaining table or unless they are legislated. And this is a right that should be legislated; a right that workers should have. . . .

Legislative Record, Maine House of Representatives, 105th Maine Legislature, June 10, 1971, p. 3864.

[14]The original version of the Severance Pay Law required notice of a plant closing but did not mandate pay in the absence of an express contract. Maine Revised Statutes, Chapter 452 (1971).

Finally, the Severance Pay Law is not a valid use of the State's police power. *Cf. Metropolitan,* 105 S.Ct at 2398. Whatever the limits of the police power, this Court has never held that it permits state regulation which interferes with the operation and purpose of federal labor law. In fact, as the Court has recently reiterated, even the exercise of a quintessential local function is held preempted when it intrudes into the collective bargaining process. *Golden State Transit,* 106 S.Ct. 1395.

Appellee and the Maine Supreme Judicial Court apparently construe *Metropolitan* as protecting from preemption any state law of general application which equally affects union and non-union employees alike, regardless of its impact on labor relations. The logical extension of that position is that the states are free to establish, piecemeal or through comprehensive labor codes, all facets of wages, hours, terms and conditions of employment. Were this the case, the process of collective bargaining would be reduced to mere form, and employee self-organization would be discouraged. *Metropolitan,* which confirms that the bargaining process is the paramount concern of the NLRA, hardly stands for this proposition. Appellee's reliance at all on *Metropolitan* is misplaced, because the Severance Pay Law is crucially distinct from the Massachusetts insurance law. Further, Appellee's reading of *Metropolitan* is incorrect and inconsistent with the long line of free play preemption cases decided by the Court during the past fifty years.

D. In Preempting the Maine Severance Pay Law, The Court Can Provide Guidance and Clarification of the Principles of "Free Play" Preemption.

As is set out above, in applying free play preemption the Court has consistently struck down state regulation which upsets the balance of power in negotiations and in the unfettered use of legitimate economic weapons, and has only sustained state regulation where there is clear indication that Congress affirmatively intended to permit it. However, particularly since the divided opinion in *New York Telephone,* the Court's rationale has differed somewhat in emphasis and expression from case to case. As one commentator has suggested, there is a continuing need for clarification and consistency in the "free play" area. Cox, *Recent Developments in Federal Labor Law Preemption,* 41 Ohio St. L.J. 227, 300. The detrimental result is that it has become difficult for state courts, legislatures and other regulatory bodies, as well as for labor and management, to predict in advance whether a regulation is susceptible to preemption. The Chamber respectfully urges the Court to clarify this complex area through the vehicle of this case. Specifically, the Chamber urges that in preempting the Maine Severance Pay Law, the Court confirm that the *effect* of state regulation, rather than its purpose or subject matter, is dispositive on preemption. The majority holding in *Golden State Transit* makes this point. However, in light of dictum in *Metropolitan* and Justice Steven's dissent in *New York Telephone* suggesting a presumption of validity for laws of general application, further clarification would be helpful. Additionally, the Chamber urges the Court to confirm that preemption follows whenever a state regulation affects the bargaining process, either by burdening one side's ability to negotiate freely and equally on mandatory subjects more than the other's or by restricting either party's use of a legitimate economic weapon. Finally, this case presents the opportunity for the Court to reiterate that a state's police power may not be invoked to regulate an area which is already regulated or deliberately left unregulated by federal labor law.

E. The Maine Severance Pay Law Regulates Conduct Which Is Protected by the NLRA And Within the Primary Jurisdiction of the NLRB.

An employer's obligations to employees in the event of a decision to close or relocate its operations are regulated by the NLRA. *See, e.g., Fibreboard Paper Products* v. *NLRB,* 379 U.S. 203 (1964); *First National Maintenance Corp* v. *NLRB,* 452 U.S. 666; *Otis Elevator Co.,* 269 N.L.R.B. 891 (1984).

Whether an employer is compelled to bargain in good faith over either the decision or the effects of the closing or both is controlled by the NLRA,[15] and the employer may invoke certain rights protected under the NLRA as part of the bargaining process. As noted in Section (B)(2) above, the employer would have the right to refuse to agree to severance pay and to stand on its refusal. In the face of *bona fide* impasse, the employer would also have the right to implement its last, best bargaining offer on severance. The unilaterally implemented offer would become the "last word" on severance pay. The Severance Pay Law's interference with the actually or arguably protected rights of the employer invokes *Garmon* as well as "free play" preemption. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236.

In addition to interfering with rights protected by the NLRA, the Severance Pay Law interferes with the exclusive jurisdiction of the NLRB. The risk of overlapping proceedings and findings between the state court and the NLRB is particularly great if the parties have negotiated, failed to reach agreement on severance, and the employer has unilaterally implemented its last best offer. In this situation, the union is likely to challenge the employer's unilateral action by filing a refusal to bargain charge with the NLRB. Whether *bona fide* impasse has been reached is "often difficult for the bargainers and is necessarily so for the Board", raising fact issues "involving the Board's presumed expert experience and knowledge of Company problems." *Dallas General Drivers, Local 745* v. *NLRB,* 355 F.2d 842, 844 (D.C. Cir. 1966). At the same time the State could proceed with enforcement of the Severance Pay Law. The existince and nature of the parties' agreement on severance pay would be the subject

[15]Under some circumstances, the employer would have no obligation to bargain either the decision or the effects. For example, the union may have waived the right to bargain any aspect of the closing, see, *e.g., Speidel Corp.,* 120 N.L.R.B. 733 (1958), or a collective bargaining agreement may specifically cover all aspects of the closing sufficiently to preclude any further bargaining obligation, see, *e.g., NLRB* v. *Jacobs Manufacturing Co.,* 196 F.2d 680 (2d Cir. 1952).

of both state enforcement proceedings and NLRB proceedings. Different and conflicting remedial schemes would apply. This is precisely what Congress was seeking to avoid when it established the NLRB to administer federal labor policy.[16] *Garmon,* 359 U.S. at 247.

None of the narrow exceptions to *Garmon* applies to the Severance Pay Law. *Garmon* preemption will not follow when: (1) the conduct at issue is neither protected nor arguably protected by the NLRA; (2) the state's interest is "overriding" and deeply rooted in local feeling and responsibility; and (3) the state action will not interfere with effective administration of national labor policly. *Farmer* v. *United Brotherhood of Carpenters,* 430 U.S. 290 (1977). In addition to being outside the exceptions because it regulates conduct which is protected or arguably protected and interferes with the jurisdiction of the NLRB, the Severance Pay Law is not rooted in a state interest which overrides the federal policy or is exceptionally local in nature. Although Maine undoubtedly has

[16]The Severance Pay Law not only interferes with the jurisdiction of the NLRB, but would likely enmesh the state court in interpreting and applying the existing collective bargaining agreement. Among the myriad issues which could arise are whether a contractual severance pay clause applies in the event of business termination and therefore constitutes an "express contract" in mitigation of the Severance Pay Law; which employees have been "employed" for three years, as that term is defined by the parties; whether the union had waived any claim to severance pay during negotiations; and what effect waiver would have on the right to claim statutory severance pay. Indeed, in this case the Maine Supreme Judicial Court determined whether the dispute was arbitrable. These issues are not to be determined in the context of state law. Instead, questions arising under a collective bargaining agreement must be determined exclusively by reference to federal law in actions brought either under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), or under the grievance and arbitration procedure in the bargaining agreement. *Allis-Chalmers* v. *Lueck,* 105 S.Ct. 1904. "State-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." *Id.*

an interest in accommodating the rights of employees and employers during a plant termination, that same accommodation has been made in the NLRA and cannot be regulated based on the State's generalized interest. The "local interest" exception so far has been applied only to controversies involving common law torts, where state law operates independent of labor relations issues. *See, e.g., Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters,* 436 U.S. 180 (1978) (trespassory picketing); *Farmer* v. *United Brotherhood of Carpenters,* 430 U.S. 290 (intentional infliction of emotional distress); *Belknap, Inc.* v. *Hale,* 463 U.S. 491 (1983) (injury to third parties by misrepresentations during a strike).

The Severance Pay Law invokes no exceptions. It must be preempted under *Garmon* and this Court's consistent protection of the primary jurisdiction of the NLRB to administer federal labor law.

III. The Maine Severance Pay Law Should Be Held Preempted By ERISA And The NLRA As A Matter Of National Industrial and Employment Relations Policy.

In 1986 eighteen state legislatures considered 38 separate bills concerning plant closings, relocations and reductions in force.[17] Three of those bills would provide mandatory severance pay.[18] Several of the bills would require continuation of health insurance plans at the employer's expense.[19] The Massachusetts legislature is considering amending its voluntary plant closing "compact" to make notice and severance pay provisions mandatory.[20] It is no exaggeration to predict that mass intrusion by the states into the federally-regulated arenas of welfare benefits and collective bargaining will be triggered by a signal that state regulation of those areas is permissible. Validation of the Maine Severance Pay Law would be that signal.

[17] *"Clearinghouse,"* Vol. 2, No. 15, August/September 1986. National Center On Occupational Readjustment, Inc.

[18] Illinois, H. 2665 and H. 2924; Missouri, H. 1128 & S. 601; West Virginia, S. 323.

[19] Illinois, H. 2924; Massachusetts S. 92 and H. 2952; Pennsylvania H. 793; New York, A. 10523.

A recent survey by the United States Department of Labor documents the potential impact of state intrusion on severance pay plans alone. Forty-five percent of employers with fifty (50) or more employees in professional, administrative, technical, clerical, or production classifications have severance pay plans.[21] If even some of those employers were compelled to have "express contracts" to be exempt from a statute such as Maine's Severance Pay Law, existing ERISA-covered plans for a significant number of employers and employees would be nullified. One more economic decision which employers traditionally have made on the basis of cost, benefits to be achieved and the competition within their industries will have been politicized and withdrawn from the business judgment arena.

If state-by-state regulation of welfare benefits were permitted, multi-state employers would have to cope with a plethora of severance pay and other welfare benefit requirements. One state law could exempt any employer with an express contract providing the benefit; another could exempt any company with a unilaterally adopted plan. Some states might tie the required benefit coverage to gross sales of the company, others to the gross wages paid by the company. Whatever the diverse requirements of state laws, a multi-state employer's ability to plan

[20] Massachusetts, S. 92 and H. 2952 (1986).

[21] U.S. Dept. of Labor, Bureau of Labor Statistics, July 1986, Bulletin 2262. Another study by the American Society for Personnel Administration suggests an even higher percentage, with 84.6% of those responding to the survey having such plans. *Most Firms Have Severance Pay Programs,* Resource, October 1986, p. 2.

its cost of operations or to base business decisions on the resources and markets available in any given location would be greatly complicated. The "crowning achievement" of ERISA, "eliminating the threat of conflicting and inconsistent state and local regulations,"[22] would also be gutted. The trade-off for many companies in accepting ERISA's stringent procedures and administrative safeguards, as well as the heavy cost of required funding, was the ability to plan according to one set of rules. With the loss of that ability many companies may eliminate or elect not to create pension welfare benefit plans.

It is reasonable and laudable that the states be concerned with the economic hardship that may result from plant closings. Indeed, many states currently have unemployment compensation insurance laws and training programs which aid displaced workers. The states' interest in plant closing protections, however, does not legitimize the establishment of state labor codes governing all aspects of the employment relationship. It would risk economic turmoil to permit states at this time to change wholesale the rules upon which employment relations have been planned and conducted. Multi-state companies, struggling both to recapitalize and to compete with well made and lower cost foreign products, simply cannot cope with the prospect of every state or local government establishing laws governing wages (including pension and welfare benefits), hours and conditions of employment.

In sum, Congress has declared our uniform and comprehensive national labor policy, and the nation's employers and employees have relied on those declarations. This Court should effectuate those policies and apply the well-established preemption principles of ERISA and NLRA in holding the Maine Severance Pay Law preempted.

[22]Remarks of Sponsor Representative Dent, 120 Cong. Rec. 29197 (1974).

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted,

RICHARD G. MOON
(Counsel of Record)
LINDA D. MCGILL
JOHN H. RICH III
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza, P.O. Box 426
Portland, Maine 04112
(207) 774-2635
Counsel for Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

(10)

No. 86-341

IN THE

Supreme Court of the United States

October Term 1986

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

—against—

P. DANIEL COYNE, Director, Bureau of Labor Standards, Department of Labor,

Appellee.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

RICHARD G. MOON
(*Counsel of Record*)
LINDA D. MCGILL
JOHN H. RICH III
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza
P.O. Box 426
Portland, Maine 04112
(207) 774-2635
Counsel for Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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Questions Presented

1. Whether the Maine Severance Pay Law, which requires certain employers either to enter into an express contract providing for severance pay with certain employees or, in the absence of such an agreement, to pay the state mandated amount of severance pay, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*.

2. Whether the Maine Severance Pay Law is preempted by the National Labor Relations Act, 29 U.S.C. § 141 *et seq*.

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Statement of Interest

The Chamber of Commerce of the United States of America (the Chamber) is a federation consisting of approximately 180,000 companies and several thousand state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, Congress and federal agencies. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation.[1] The Chamber submits this brief in support of Appellant Fort Halifax Packing Company, Inc.[2]

This case involves the State of Maine's requirement that employers with 100 or more employees in one location during a specified twelve-month period enter into express contracts with certain of their employees to pay severance pay to such employees or pay the state-mandated amount of severance pay upon a substantial cessation of the employer's business. The issues are whether Maine's law mandating severance pay (the Maine Severance Pay Law or Severance Pay Law) is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) regulating employee benefit plans and whether the Maine Severance Pay Law impermissibly interferes with the

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[1] *E.g., Wisconsin Department of Labor and Industry* v. *Gould*, 106 S.Ct. 1057 (1986); *Pattern Makers League of North America* v. *NLRB*, 105 S.Ct. 3064 (1985); *Allis-Chalmers Corp.* v. *Lueck*, 105 S.Ct. 1904 (1985); *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

[2] Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the parties have consented to the Chamber's *Amicus Curiae* participation in this appeal. Their letters of consent are filed with this Brief.

federal labor scheme and protected rights declared in the National Labor Relations Act (NLRA).

These issues are of vital concern to the Chamber's members. Many members operate businesses in Maine and are directly affected by the Severance Pay Law. Moreover, the potential impact of the Severance Pay Law extends beyond Maine's borders. Because this Court's decision will significantly affect state and federal law in the areas of employee benefits and labor relations, the Chamber submits this brief to assist the Court in resolving this case.

Statement of the Case

Fort Halifax Packing Company, Inc. (Halifax), a wholly-owned subsidiary of Corbett Enterprises, Inc., operated a poultry processing and packaging plant in Winslow, Maine. (App. 22). On May 23, 1981, Halifax ceased operations and laid off more than 100 employees. At the time of the closing, many Halifax employees were represented by Local 385 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The existing collective bargaining agreement between Halifax and Local 385, effective June 2, 1979 to June 2, 1982, had no provision for severance pay. There was no contract or agreement covering severance pay between Halifax and its supervisory employees. (App. 2-3).

In September, 1981, Halifax officials believed that reopening the plant was possible. Accordingly, Halifax and Local 385 negotiated amendments to the collective bargaining agreement providing that Halifax would have no severance pay liability under the Maine Severance Pay Law if operations resumed. The plant did not reopen. (App. 3).

Halifax did not pay severance under the Maine Severance Pay Law. On October 30, 1981, eleven employees filed suit against Halifax in Kennebec County Superior Court seeking severance pay pursuant to Section 625-B(4) of the Maine

Severance Pay Law. The Director of the Maine Bureau of Labor Standards also commenced an enforcement action in Superior Court on behalf of all Halifax employees. (App. 3-4). The trial justice found Halifax liable for severance pay. (App. 42-43). Halifax appealed the decision to the Maine Supreme Judicial Court, urging, *inter alia,* that the Severance Pay Law was preempted by ERISA and the NLRA. The Chamber participated as *Amicus.*

On June 6, 1986, the Supreme Judicial Court issued a decision modifying the trial justice's calculation of severance pay to ten employees and affirming the judgment of the Superior Court in all other respects. (App. 1-20).

Summary of Argument

Through ERISA and the NLRA, Congress has sought to assure both the protection of employee benefits promised by employers and the ability of employees voluntarily to organize and negotiate for such benefits. The Chamber believes that affirmance of the decision of the Maine Supreme Judicial Court in this case would not only be contrary to this Court's prior decisions concerning the preemptive sweep of ERISA and the NLRA, but would nullify Congress' efforts to achieve uniform federal policy in the areas of employee benefits and collective bargaining. Disruption of the nation's well-established labor policies would place a costly burden on the nation's employers, to the ultimate detriment of employees. The Chamber urges that the Maine Severance Pay Law be held preempted on the bases summarized below.

A. ERISA Preemption.

Under the plain language of ERISA, as well as the decisions of this Court, it is settled that a state may not pass a law which relates to, that is, has a connection with or reference to, a severance pay plan. The Severance Pay Law does far more than relate to a severance pay plan. It directly regulates such plans

by (1) nullifying plans which are neither express nor created by contract, but are nevertheless ERISA plans, and (2) in the absence of an express contract, establishing the state's own plan under ERISA, specifying the amount of severance pay, the class of beneficiaries and the procedures for distribution. Contrary to Appellee's position, the Severance Pay Law is not within ERISA's exception for unemployment compensation insurance laws, since the Severance Pay Law has no relationship to that well-recognized system. Instead, the Severance Pay Law is precisely the kind of regulation which, unless invalidated by this Court, will permit a state to require an employer to have any kind of benefit plan the state chooses, undoing the uniform and consistent regulation of employee welfare benefits which was the core of Congress' intent in enacting ERISA.

B. NLRA Preemption.

The Maine Severance Pay Law affects and was intended to affect the balance of power in collective bargaining. It provides employees a benefit to use as a bargaining chip in negotiations and precludes an employer from exercising certain protected rights. Accordingly, the Severance Pay Law is preempted by both doctrines of federal labor law preemption developed by this Court.

First, the Severance Pay Law affects the collective bargaining process by tipping the balance of power because it imposes economic consequences on the employer, but not on employees, if no express contract for severance pay results from negotiations. The effect of the Severance Pay Law is to force on the employer an express contract on a mandatory subject of bargaining, even though such an agreement cannot be compelled, and can be resisted absolutely, under the NLRA. The Severance Pay Law is not protected by *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S. Ct. 2380 (1985). Unlike the Massachusetts insurance regulation at issue in *Metropolitan*, the Severance Pay Law gives the employer no choice: the employer must expressly contract for the benefit or face the mandatory state payment. The Severance Pay Law does not establish a minimum standard for benefits and is not the kind of regulation tolerated by Congress as part of the historical context of the NLRA.

Secondly, the Severance Pay Law eviscerates the employer's protected right and economic weapon of implementing after *bona fide* impasse its last, best offer on severance pay. The Severance Pay Law also thrusts the state court into the determination of an employer's obligation to its unionized employees in the context of a plant closing, an area exclusively and extensively regulated by the National Labor Relations Board (NLRB), or alternatively into the area preempted by Section 301 of the Labor Management Relations Act. By attempting to impose a different and conflicting remedy than does the NLRA for an employer's refusal to contract for severance pay, the Severance Pay Law interferes directly with the scheme chosen by Congress for regulating labor management relations.

The Court should hold preempted the Maine Severance Pay Law to effectuate the letter and intent of ERISA and the NLRA. Maine and other states will remain free to remedy the economic and social disruption of business terminations by any method which does not eviscerate federal law.

ARGUMENT

I. The Maine Severance Pay Law Is Preempted By The Employee Retirement Income Security Act.

A. Severance Pay is a Welfare Benefit Covered by ERISA.

In the wake of this Court's decisions in *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Industries, Inc.*, 106 S.Ct. 3267 (1986) and *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), it is

settled that severance pay is a welfare benefit under ERISA, and any plan, fund, or program providing for severance pay is an ERISA-covered plan. Two separate rationales compel this conclusion. On the one hand, severance pay assists employees during the unemployment that follows job termination and as such is a "benefit[ ] in the event of . . . unemployment" within the definition of employee welfare benefit plan in Section 3 (1)(A) of ERISA, 29 U.S.C. §1002(1)(A). *Holland*, 772 F.2d at 1145.[3] So too, severance pay falls within the ambit of Section 3(1)(B), 29 U.S.C. §1002(1)(B), which incorporates by reference the "pooled vacation, holiday, *severance* or similar benefits" described in Section 302(c) of the Labor Management Relations Act, 29 U.S.C. §186(c) (emphasis added). *Id.*[4] Thus, under the ordinary meaning of the language of the statute, as well as unanimous case law, it is indisputable that a severance pay plan is an employee welfare benefit plan governed by ERISA. Confronted with this unassailable proposition, Appellee argues that the Maine Severance Pay Law is saved from ERISA preemption because it does not "relate to" an ERISA-covered welfare benefit plan, or, if it does, it is saved from preemption by the exception in ERISA for unemployment compensation insurance laws. These arguments are unsupportable.

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[3]*Accord Gilbert*, 765 F.2d at 325; *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Petrella* v. *NL Industries, Inc.*, 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an "unemployment' benefit.").

[4]*Accord Blakeman* v. *Mead Containers*, 779 F.2d 1146, 1149 (6th Cir. 1985); *Gilbert*, 765 F.2d at 325; *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Sly*, 712 F.2d at 1210-11; *Donovan* v. *Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*); *Dependahl* v. *Falstaff Brewing Corp.*, 491 F.Supp. 1188, 1196 (E.D. Mo. 1980), *aff'd in relevant part*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).

B. The Maine Severance Pay Law "Relates to" an ERISA-covered Employee Welfare Benefit Plan.

Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Indeed, this Court has held that "[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S.Ct. at 2389. In defining ERISA's preemptive sphere, this Court has given the statute a broad reading: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

Ignoring the broad construction that must be given ERISA's preemptive sweep, Appellee's entire defense of the Maine Severance Pay Law rests on the narrow argument that since Fort Halifax did not maintain a severance pay plan, the Maine Severance Pay Law could not relate to such a plan. This facile approach is wrong. It ignores that the Maine Severance Pay Law not only "relates to" but in fact establishes an ERISA-covered plan. Moreover, the conflict with ERISA is direct because any number of ERISA-covered plans maintained by employers would not be recognized by the Maine Severance Pay Law.

1. The Maine Severance Pay Law Establishes an ERISA-Covered Plan.

By mandating that a covered employer have an "express contract" providing for severance pay, 26 M.R.S.A. § 625-B(3)(B) the Maine Severance Pay Law could not have a more direct "connection with or reference to" an ERISA-covered severance pay plan. The question of when severance pay benefits constitute an ERISA-covered plan was carefully considered in

Donovan, 688 F.2d 1367, wherein the Eleventh Circuit, sitting *en banc*, formulated a persuasive test: "[A] 'plan, fund or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373.[5] In the case of the Maine Severance Pay Law, the intended benefits are severance pay at the rate of one week's pay for each year of employment, 26 M.R.S.A. §625-B(2); the class of beneficiaries are employees of three years or more, 26 M.R.S.A. §625-B (3)(D); the source of financing is simply the employer's general assets;[6] and the procedure for receiving benefits is provided, including in the event of non-payment, suits by employees, 26 M.R.S.A. §625-B(4), or enforcement suits by the Director of the Maine Bureau of Labor, 26 M.R.S.A. §625-B(5).

Just as clear is the fact that such a state-mandated plan is impermissible. *Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), establishes that a state may not mandate creation of an ERISA welfare benefit plan.[7] As the court in *Agsalud* recognized, re-

[5]*Accord Scott*, 754 F.2d at 1503-04; *Molyneux* v. *Arthur Guinness & Sons*, 616 F.Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.*, 567 F.Supp. 1258, 1267 (N.D. Ala. 1983).

[6]Any argument that the State-imposed severance pay plan would not be covered by ERISA because it is not specifically funded has been finally laid to rest. *See Holland*, 772 F.2d at 1145 ("We also reject the Commissioner's contention that Burlington's severance pay plan is not within ERISA because it is not specially funded."); *accord Gilbert*, 765 F.2d at 325-26 (unfunded severance pay policy included within ERISA's definition of employee welfare benefit plan); *Scott*, 754 F.2d at 1502 (Department of Labor regulation promulgated under ERISA "does not limit the definition to those severance benefits which are pooled or which are funded by a trust fund.").

[7]*Accord Stone & Webster Engineering Corp.* v. *Isley*, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi* v. *Stone & Webster Engineering*, 463 U.S. 1220 (1983).

quiring an employer to have an ERISA-covered plan or to be subject to Maine's own welfare benefit plan is "relating to" an existing welfare benefit plan. If not, any employer without an ERISA-covered plan of whatever kind—be it a pension plan, a health plan, an accident plan, *or* a severance pay plan—could be required by any state to have such a plan or to pay a state-mandated amount.[8] As this Court has repeatedly stated, "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan*, 105 S.Ct. at 2388. If Congress had intended to permit a state-mandated pension or welfare benefit

[8]Two fatal infirmities are brought to light by that scenario. First, as noted in *Holland*, *supra*, ERISA's broad preemption of state laws furthers a major policy objective: uniformity in employee benefit laws. According to the Court in *Holland*, Congress realized that myriad state regulations of employee benefit plans had become a major concern to employers with plants, divisions, or employees scattered in numerous states, and a broad preemption provision was an integral part of ERISA's response. *Holland*, 772 F.2d at 1147, citing *Shaw*, 463 U.S. at 99.

> Any hope of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result.

Holland, 772 F.2d at 1147 n.5.

In addition, as this Court has observed, ERISA does not mandate that employers provide any particular benefit. *Shaw*, 463 U.S. at 91; *see also Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 183 (1986) ("ERISA mandates no minimum substantive content for employee welfare benefit plans."); *Sutton* v. *Weirton Steel*, 567 F.Supp. 1184, 1195 (N.D.W. Va), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) ("ERISA does not require an employer to offer any type of benefit."). The Maine Severance Pay Law then clashes head-on with ERISA's policy of not requiring employers to establish any particular welfare benefit plan.

plan, where the affected employer did not have such a plan, Congress could certainly have done so. The omission from the specific exceptions to ERISA's broad preemptive language of the exception asserted by Appellee is further proof of Congress' clearly stated intent to assure uniformity of pension and welfare benefit plan treatment.[9]

2. The Maine Severance Pay Law Conflicts Directly with ERISA.

Quite contrary to Appellee's suggestion that the parties do "not argue that there is any conflict between ERISA and the Maine Severance Pay Law," Motion to Dismiss or Affirm at 5, the conflict between the two laws is glaring. Just two of many possible scenarios make this clear. The first example is the Burlington severance pay plan recognized by this Court in *Holland* and *Gilbert* as covered by ERISA. Not only would such plans be invalid in Maine under the Severance Pay Law, they would be replaced by the severance pay plan contained in the Maine Severance Pay Law.

In both *Holland* and *Gilbert*, the severance pay provision of Burlington Industries was set forth only in its Policy Manual and its Salaried Employee Handbook. The Burlington program provided for disqualification for narrow reasons, the determination of which was left to the company's discretion as long as it did not act arbitrarily or capriciously. Crucially, in each case the Circuit Court recognized that a unilateral statement of intent to pay severance pay, with no trustee, trust fund or filing with the Department of Labor, constitutes an ERISA-covered plan. *Holland*, 772 F.2d at 1144-1145; *Gilbert*, 765 F.2d at 324-326. Since the Maine Severance Pay Law exempts from its requirements only those severance pay arrangements which are

[9]As Representative Dent, one of ERISA's sponsors, noted: "With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation." 120 Cong. Rec. 29197 (1974).

created by an "express contract," 26 M.R.S.A. §625-B(3)(B), Burlington's ERISA-covered plan would *not* be recognized. Under the Maine Supreme Judicial Court's decision below, Burlington would be required to comply with the Severance Pay Law.

As the Burlington example illustrates, the effect of the Maine Severance Pay Law is to invalidate or supplement a plan which is within the scope of ERISA. No law can have a more direct "reference or connection" with an ERISA-covered benefit plan than the Maine Severance Pay Law. The Maine Supreme Judicial Court's conclusion to the contrary is in direct conflict with this Court's decisions. Indeed at footnote 9 of its opinion (App. 9), the Maine Supreme Judicial Court implicity acknowledges the conflict, underscoring the need for this Court to state that the Maine Severance Pay Law does relate to ERISA benefit plans and is preempted.[10]

While the Burlington example alone eliminates the plausibility of arguing that the Severance Pay Law does not relate to ERISA-

[10]A long line of cases follows *Holland* and *Gilbert* and stands uniformly for the proposition that a voluntary, unilateral declaration of severance pay benefits by an employer, with no employee participation in the development of the plan, much less an "express contract" for such benefits with the employees, constitutes an employee welfare benefit plan which is covered by ERISA. *See Barry* v. *Dymo Graphics Systems, Inc.*, 478 N.E. 2d 707 (Mass. 1985) (voluntary obligation in personnel policies); *Blau*, 748 F.2d at 1352 (voluntary undisclosed plan); *Donovan*, 688 F.2d at 1372 (no formal, written plan required); *Jung*, 755 F.2d at 709 (voluntary unilateral plan for salaried personnel); *Petrella*, 529 F.Supp. at 1362 (severance pay by tradition, not even disclosed in writing to employees, and purely discretionary); *Sly*, 712 F.2d at 1210 (unilateral policy statement); *Dependahl*, 491 F.Supp. at 1190 (unilateral severance pay policy in policy manual); *Pinto* v. *Zenith Radio Corp.*, 480 F. Supp. 361, 362 (N.D. Ill. 1979) (unilateral corporate statement); *Donnelly* v. *Aetna Life Insurance Co.*, 465 F. Supp. 696 (E.D. Pa. 1979) (unilateral statement in personnel manual that plaintiffs never saw). None of these ERISA-covered plans involved an "express contract." Accordingly, none would mitigate the mandatory pay-out in the Severance Pay Law, and the State's mandated amount would replace such ERISA-covered plans.

covered welfare benefit plans, a second scenario renders Appellee's argument indefensible. The example hypothesizes an employer subject to the Severance Pay Law, who voluntarily elects to create a severance pay plan, files it with the U.S. Department of Labor, establishes a claims procedure, describes the plan in its handbook and distributes a summary plan description to covered employees, all in compliance with ERSIA regulations. Even that ERISA-covered plan is invalidated by Maine's Severance Pay Law, because there is not the "express contract" required by the Severance Pay Law.

In an attempt to avoid this direct conflict between ERISA and the Severance Pay Law, Appellee may suggest that unilateral employer action satisfies the requirement of an express contract. Appellee then would be conceding that whatever amount of severance pay, including zero, an employer wished to declare would exempt the employer from the mandatory pay provision of the Maine Severance Pay Law. Heretofore Appellee consistently has refused to take that position. Indeed, the language of the Severance Pay Law requiring "an express contract providing for severance pay" cannot logically be read to encompass that position. If an employer could unilaterally create, amend, or reduce to zero its severance pay plan, the Severance Pay Law would be meaningless. Appellee's dilemma of course is that only this reading of the Severance Pay Law avoids a direct conflict with ERISA's preemption provisions.[11]

[11]Similarly, Appellee's suggestion in its Motion to Dismiss, at 8 n.5, that the parties could "contract" to eliminate severance pay benefits is meaningless. Employees could simply refuse to agree to no severance pay, or to any amount less than that provided by the Maine Severance Pay Law, and have the state-mandated amount apply automatically. Additionally, a contract for no severance pay is contrary to the fundamental intent of the Severance Pay Law to "alleviate the adverse economic impact upon the employees and the community in which they live". Statement of Fact, Maine Revised Statutes, Chapter 452 (1971).

In sum, the Maine Severance Pay Law renders ERISA's preemption provisions invalid and its goal of uniformity of regulation meaningless. This outcome is in direct conflict with Congressional intent and with this Court's repeated holdings on the effect of ERISA preemption.

C. The Maine Severance Pay Law Is Not An "Unemployment Compensation" Law Excepted by 29 U.S.C. §1003(b)(3).

This Court has previously noted that "[t]he only relevant state laws, or portions thereof, that survive [ERISA's] preemption provision are those relating to plans that are themselves exempted from ERISA's scope." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981). Section 4 of ERISA provides in part that ERISA "shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . insurance laws. . . ." 29 U.S.C. §1003(b)(3). Appellee suggests that Section 4 can be construed as a saving clause permitting the Maine Severance Pay Law. Motion to Dismiss or Affirm at 12 n. 8. In doing so, Appellee ignores the settled meaning of the phrase "unemployment compensation insurance law."

Since 1935, Sections 301 through 303 of the Social Security Act, 42 U.S.C. §§ 501-503, have provided a distinct statutory scheme "for the purpose of assisting the States in the administration of their *unemployment compensation laws. . . .*" 42 U.S.C. §501 (emphasis added). Pursuant to this federal scheme, Maine has enacted its own detailed laws governing unemployment compensation. *See* 26 M.R.S.A. §1041 *et seq.* Under such laws, employers in Maine are required to pay into a state-maintained fund, from which benefits are paid, with employer assessments for additional or increased payments to the fund based upon the employer's individual unemployment experience rating, precisely in the form of an insurance fund. The Maine Severance Pay Law plays no role in Maine's detailed

unemployment compensation insurance laws. When Congress listed plans required solely to comply with state unemployment compensation insurance laws as an exception to the broad preemption of ERISA, Congress was clearly aware of the well-established body of state unemployment compensation insurance laws then existing, and the interrelationship between such laws and related federal laws such as the Social Security Act and the Internal Revenue Code.

Indeed, the conclusion that the unemployment compensation insurance laws excepted from ERISA in 29 U.S.C. §1003(b)(3) must be narrowly defined is supported in ERISA itself.[12] The statutory section immediately preceding 29 U.S.C. §1003 provides that: "The term[ ] 'employee welfare benefit plan' mean[s] any plan, fund, or program . . . established or maintained . . . for the purpose of providing . . . (A) . . . benefits in the event of . . . *unemployment*. . . ." 29 U.S.C. §1002(1) (emphasis added). If, as Appellee suggests, the unemployment compensation exception in ERISA governs any termination of employment, the provision of 29 U.S.C. §1002(1)(A), which provides that plans established to provide benefits for unemployment are ERISA-covered employee welfare benefit plans, is vitiated. In addition, Appellee's assertion is directly rejected by the unanimous line of cases, cited at footnote 3 above, which holds that precisely because severance pay is a benefit in the event of unemployment, severance pay is an employee welfare benefit plan covered by ERISA.

If Appellee's definition of unemployment compensation insurance were adopted, the 29 U.S.C. §1003(b)(3) exception to ERISA preemption would swallow the rule. The tautology—that severance pay lessens the hardship of unemployment and therefore severance pay is "unemployment compensation"—is

[12]This Court has previously underscored the "narrow exceptions" carved out by Congress in ERISA. *Shaw*, 463 U.S. at 105. *See also* 120 Cong. Rec. 29197, 29933.

overbroad. Without the clearly stated intent of Congress, indeed contrary to Congress' stated intentions to cover benefits for unemployment, there is no basis to alter the ordinary meaning of unemployment compensation insurance laws. By departing from the customary meaning of unemployment compensation, Appellee's argument leads to the conclusion that since retirement benefits lessen the hardship of an end to employment, pension benefits also constitute unemployment compensation. Taken to its logical extension, it would allow any state total freedom in mandating any benefit, including pensions. This flies in the face of the purpose of ERISA and should be rejected.

II. The Maine Severance Pay Law Is Preempted By The National Labor Relations Act.

A. Overview of NLRA Preemption.

In drawing the boundaries of federal labor law preemption, this Court has developed two distinct branches of analysis. The so-called free play branch, articulated in *Lodge 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Commissions*, 427 U.S. 132 (1976), precludes state regulation of areas which intentionally have been left by Congress "to be controlled by the free play of economic forces" between employers and employee organizations. *Machinists*, 427 U.S. at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971). In recent years the Court has entertained a steady flow of cases raising "free play" preemption claims. The Court's expression of the free play doctrine has varied somewhat depending on the facts at bar, the clarity of Congressional intent to allow state regulation on the issue, and the unanimity of the Justices. Nevertheless, the litmus test for "free play" preemption has remained constant. If a state or local regulation tips the balance of bargaining power toward one side or the other to a degree not countenanced by Congress,

it is preempted. *Machinists*, 427 U.S. at 153; *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519; *Metropolitan Life Insurance Company* v. *Massachusetts*, 105 S.Ct. 2380; *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. 1395 (1986); *Wisconsin Department of Industry* v. *Gould*, 106 S.Ct. 1057. *See also* Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio State L.J. 277, 292, 294-95 (1980). This test controls regardless of the form of regulation (state labor board injunction, *Machinists*, 427 U.S. 132; exercise of a traditional local function, *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. 1395; state court judgment, *Teamsters* v. *Morton*, 377 U.S. 252; state legislation, *New York Telephone* v. *New York State Department of Labor*, 440 U.S. 519; state's spending decisions, *Wisconsin Department of Industry* v. *Gould, Inc.*, 106 S.Ct. 1057) or whether the regulation is one which applies to the general public or operates specifically on employers, employees and unions.

Under the second preemption doctrine, the states must yield exclusive jurisdiction to the NLRB whenever the conduct that the state seeks to regulate is subject to NLRB jurisdiction and is protected, prohibited or arguably protected or prohibited by the NLRA. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The Garmon doctrine "is intended to preclude state interference with the NLRB's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. at 1398, quoting *Wisconsin Department of Industry* v. *Gould*, 106 S.Ct. at 1062.

B. The Maine Severance Pay Law Is Preempted Under the "Free Play" Doctrine.

1. The Severance Pay Law Impermissibly Intrudes Into the Bargaining Process.

The process of collective bargaining is the primary concern of the NLRA. *Metropolitan*, 105 S.Ct. at 2395, 2396. *See also New York Telephone Company* v. *New York State Department of Labor*, 440 U.S. at 551 (Powell, J., dissenting). As envisioned by Congress, bargaining must occur in an atmosphere of equality. *Metropolitan*, 105 S.Ct. at 2395; *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. at 1400. A state cannot " 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees." *Machinists*, 427 U.S. at 147.

The Maine Severance Pay Law prevents the process of collective bargaining from operating with the balance and equality decreed by Congress. Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 678, n.15 (1981). Indeed, in negotiations triggered by an employer's decision to terminate or relocate its operation, severance pay is often the crucial issue. The union typically proposes a high amount of severance; the employer counters with a lower amount or even zero. In the framework of unfettered collective bargaining under the NLRA, each party is then free to wrest concessions in exchange for its agreement to the other's proposal, to insist on its own proposal, or to refuse to agree at all. In the absence of intrusive state regution, bargaining proceeds as Congress intended: between parties who are equally positioned, are under no compulsion to agree to the other's demands, and are free to use the full panoply of economic weapons at their disposal to achieve voluntary agreement. *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. at 1400; *First National Maintenance Corp.* v. *NLRB*, 452 U.S. at 670.

An employer subject to the Maine Severance Pay Law has no equality of bargaining position. The employer comes to the bargaining table needing an express agreement on severance pay to escape the substantial payment otherwise required by the Severance Pay Law. The union has no incentive to enter into such an agreement or to make concessions to achieve its own position on severance pay, since in the absence of an express agreement, severance liability will nevertheless be imposed on the employer. The Severance Pay Law gives the union a bargaining chip which inevitably tilts negotiations on severance pay in favor of the union. The effect is to undo the Congressional decision to send the parties to the bargaining table with equivalent power.

In levying economic consequences on the employer for failing to achieve an express contract, the State is attempting both to aid the party which the State judges to be the weaker and to impose its own solution to the parties' bargaining stand-off. This Court has consistently held that state action which has this effect is preempted. "Even though agreement is sometimes impossible, the government may not step in and become a party to the negotiations." *Golden State Transit,* 106 S.Ct. at 1401. Not even the NLRB, with its broad remedial authority, can compel either party to reach agreement on a mandatory subject or burden one side more than the other for the failure to agree after good faith bargaining. *H.K. Porter and Co.* v. *NLRB,* 397 U.S. 99 (1970). Maine may not attempt to achieve the same result.

2. The Severance Pay Law Deprives the Employer From Resorting to the Legitimate Weapon of Unilaterally Implementing Its Last, Best Offer on Severance Pay.

In addition to tipping the balance of power in actual negotiations, the Severance Pay Law interferes with the employer's ability to further its bargaining position by implementing unilaterally its last, best offer after a bargaining impasse has been reached. Unilateral implementation is a legitimate economic

weapon under the NLRA, just as is a strike or lock-out. *NLRB* v. *Katz,* 369 U.S. 736 (1962); *Reed & Prince Mfg. Co.* v. *NLRB,* 205 F.2d 131 (1st Cir.), *cert. denied,* 346 U. S. 887 (1953). The State may not impede its use any more than it could prohibit peaceful recognitional picketing, *Garner* v. *Teamsters Union,* 346 U.S. 485 (1953), a secondary boycott, *Teamsters* v. *Morton,* 337 U.S. 252, or a concerted refusal to work overtime, *Machinists,* 427 U.S. 132. Nor may the State restrict an employer's weapons more than a union's. *Golden State Transit,* 106 S.Ct. at 1401.

Applying the employer's protected right of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement its no severance pay offer. Like other employer self-help measures, the economic pressure generated by unilateral implementation would be an incentive to the union to return to the bargaining table, to curtail its own economic weapons, or to make other concessions.

Yet a Maine employer subject to the Severance Pay Law can wield no economic pressure by unilateral implementation of its severance pay offer. Without an express contract, the employer is subject to severance pay liability. The Severance Pay Law effectively eliminates this federally-sanctioned weapon from the employer's economic arsenal.[13] Under this Court's consistent decisions protecting the free use of economic weapons by either

[13]Appellant interprets the Severance Pay Law to permit an employer to establish an express contract for severance pay by unilateral declaration. Jurisdictional Statement at 12. If this view is correct, the Severance Pay Law encourages collective bargaining and operates unequally on unionized and non-unionized employees. A unionized employer may not act unilaterally under the NLRA; a non-unionized employer would have no constraint. A state law that encourages collective bargaining, or that penalizes an employee's right to refrain from union activities, is invalid. *Metropolitan Life Insurance Company* v. *Massachusetts,* 105 S.Ct. at 2398.

party to enhance its bargaining position, and rejec... state attempts to limit those economic weapons, the Maine Severance Pay Law is preempted.

C. The Maine Severance Pay Law is Not Protected under Metropolitan Life Insurance Company v. Massachusetts.

Metropolitan Life Insurance Company v. *Massachusetts,* 105 S.Ct. 2380, does not control this case, except as it affirms that equality of bargaining power is the centerpiece of the NLRA.

The issue in *Metropolitan* was a narrow one: whether a state insurance regulation that does not alter the balance of bargaining is the kind of interference with the goals of federal labor law which is forbidden by the NLRA. The dispositive difference between *Metropolitan* and this case is that the Severance Pay Law indisputably tips the balance of bargaining. Unlike the Massachusetts statute, which leaves the parties free to purchase the benefit or not, *Metropolitan,* 105 S.Ct at 2394, the Severance Pay Law gives the employer no choice. The failure to negotiate an express contract for severance pay subjects the employer to payment by law. By compelling agreement on a critical bargaining term, Maine has acted more like Los Angeles in *Golden State Transit,* 106 S.Ct. 1395, than like Massachusetts in *Metropolitan.*

In further distinction from the regulation at issue in *Metropolitan,* the Severance Pay Law does not mandate any minimum benefit. The Severance Pay Law applies only to large employers and to certain categories of employees. It permits a covered employer to make any severance pay contract whatsoever with covered employees or their bargaining representatives, arguably even for zero severance benefits. Indeed, the Severance Pay Law does not require uniform or minimum severance benefits even among covered employees in the same establishment.

Rather than setting a "specific minimum protection" for individual workers, *Metropolitan,* 105 S.Ct. at 2397, quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 739 (1981), the Severance Pay Law attempts to set the method by which covered employers and employees reach accommodation on the issue of severance pay during a plant closing. The method which the State favors—an express contract between employers and employees—is incompatible with the process of free collective bargaining chosen by Congress to accommodate the parties' interests on the same subject. The Severance Pay Law affects not only the result but the very process of bargaining, which this Court affirmed in *Metropolitan* is the foundation of federal labor law.

The Severance Pay Law is not one of the historical areas of state regulation which Congress intended to tolerate when it enacted the NLRA. Nor is it a law of general applicability. *cf. Metropolitan,* 105 S.Ct. at 2395-2396. *See also New York Telephone Company* v. *New York State Department of Labor,* 440 U.S. 519, 564. The Severance Pay Law operates directly on employers and employees rather than on the broader public. Indeed, adjustment of the relative strength between labor and management was the purpose of the Severance Pay Law. In legislative debates leading to initial enactment in 1971,[14] State Representative Bustin of the Labor Committee stated:

> It is often said that labor has no rights unless they are negotiated at the bargaining table or unless they are legislated. And this is a right that should be legislated; a right that workers should have. . . .

Legislative Record, Maine House of Representatives, 105th Maine Legislature, June 10, 1971, p. 3864.

[14] The original version of the Severance Pay Law required notice of a plant closing but did not mandate pay in the absence of an express contract. Maine Revised Statutes, Chapter 452 (1971).

Finally, the Severance Pay Law is not a valid use of the State's police power. *Cf. Metropolitan*, 105 S.Ct at 2398. Whatever the limits of the police power, this Court has never held that it permits state regulation which interferes with the operation and purpose of federal labor law. In fact, as the Court has recently reiterated, even the exercise of a quintessential local function is held preempted when it intrudes into the collective bargaining process. *Golden State Transit*, 106 S.Ct. 1395.

Appellee and the Maine Supreme Judicial Court apparently construe *Metropolitan* as protecting from preemption any state law of general application which equally affects union and non-union employees alike, regardless of its impact on labor relations. The logical extension of that position is that the states are free to establish, piecemeal or through comprehensive labor codes, all facets of wages, hours, terms and conditions of employment. Were this the case, the process of collective bargaining would be reduced to mere form, and employee self-organization would be discouraged. *Metropolitan*, which confirms that the bargaining process is the paramount concern of the NLRA, hardly stands for this proposition. Appellee's reliance at all on *Metropolitan* is misplaced, because the Severance Pay Law is crucially distinct from the Massachusetts insurance law. Further, Appellee's reading of *Metropolitan* is incorrect and inconsistent with the long line of free play preemption cases decided by the Court during the past fifty years.

D. In Preempting the Maine Severance Pay Law, The Court Can Provide Guidance and Clarification of the Principles of "Free Play" Preemption.

As is set out above, in applying free play preemption the Court has consistently struck down state regulation which upsets the balance of power in negotiations and in the unfettered use of legitimate economic weapons, and has only sustained state regulation where there is clear indication that Congress affirmatively intended to permit it. However, particularly since the divided opinion in *New York Telephone*, the Court's rationale has differed somewhat in emphasis and expression from case to case. As one commentator has suggested, there is a continuing need for clarification and consistency in the "free play" area. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. 227, 300. The detrimental result is that it has become difficult for state courts, legislatures and other regulatory bodies, as well as for labor and management, to predict in advance whether a regulation is susceptible to preemption. The Chamber respectfully urges the Court to clarify this complex area through the vehicle of this case. Specifically, the Chamber urges that in preempting the Maine Severance Pay Law, the Court confirm that the *effect* of state regulation, rather than its purpose or subject matter, is dispositive on preemption. The majority holding in *Golden State Transit* makes this point. However, in light of dictum in *Metropolitan* and Justice Steven's dissent in *New York Telephone* suggesting a presumption of validity for laws of general application, further clarification would be helpful. Additionally, the Chamber urges the Court to confirm that preemption follows whenever a state regulation affects the bargaining process, either by burdening one side's ability to negotiate freely and equally on mandatory subjects more than the other's or by restricting either party's use of a legitimate economic weapon. Finally, this case presents the opportunity for the Court to reiterate that a state's police power may not be invoked to regulate an area which is already regulated or deliberately left unregulated by federal labor law.

E. The Maine Severance Pay Law Regulates Conduct Which Is Protected by the NLRA And Within the Primary Jurisdiction of the NLRB.

An employer's obligations to employees in the event of a decision to close or relocate its operations are regulated by the NLRA. *See, e.g., Fibreboard Paper Products* v. *NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp* v. *NLRB*, 452 U.S. 666; *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984).

Whether an employer is compelled to bargain in good faith over either the decision or the effects of the closing or both is controlled by the NLRA,[15] and the employer may invoke certain rights protected under the NLRA as part of the bargaining process. As noted in Section (B)(2) above, the employer would have the right to refuse to agree to severance pay and to stand on its refusal. In the face of *bona fide* impasse, the employer would also have the right to implement its last, best bargaining offer on severance. The unilaterally implemented offer would become the "last word" on severance pay. The Severance Pay Law's interference with the actually or arguably protected rights of the employer invokes *Garmon* as well as "free play" preemption. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236.

In addition to interfering with rights protected by the NLRA, the Severance Pay Law interferes with the exclusive jurisdiction of the NLRB. The risk of overlapping proceedings and findings between the state court and the NLRB is particularly great if the parties have negotiated, failed to reach agreement on severance, and the employer has unilaterally implemented its last best offer. In this situation, the union is likely to challenge the employer's unilateral action by filing a refusal to bargain charge with the NLRB. Whether *bona fide* impasse has been reached is "often difficult for the bargainers and is necessarily so for the Board", raising fact issues "involving the Board's presumed expert experience and knowledge of Company problems." *Dallas General Drivers, Local 745* v. *NLRB*, 355 F.2d 842, 844 (D.C. Cir. 1966). At the same time the State could proceed with enforcement of the Severance Pay Law. The existence and nature of the parties' agreement on severance pay would be the subject

[15]Under some circumstances, the employer would have no obligation to bargain either the decision or the effects. For example, the union may have waived the right to bargain any aspect of the closing, see, *e.g.*, *Speidel Corp.*, 120 N.L.R.B. 733 (1958), or a collective bargaining agreement may specifically cover all aspects of the closing sufficiently to preclude any further bargaining obligation, see, *e.g.*, *NLRB* v. *Jacobs Manufacturing Co.*, 196 F.2d 680 (2d Cir. 1952).

of both state enforcement proceedings and NLRB proceedings. Different and conflicting remedial schemes would apply. This is precisely what Congress was seeking to avoid when it established the NLRB to administer federal labor policy.[16] *Garmon*, 359 U.S. at 247.

None of the narrow exceptions to *Garmon* applies to the Severance Pay Law. *Garmon* preemption will not follow when: (1) the conduct at issue is neither protected nor arguably protected by the NLRA; (2) the state's interest is "overriding" and deeply rooted in local feeling and responsibility; and (3) the state action will not interfere with effective administration of national labor policy. *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977). In addition to being outside the exceptions because it regulates conduct which is protected or arguably protected and interferes with the jurisdiction of the NLRB, the Severance Pay Law is not rooted in a state interest which overrides the federal policy or is exceptionally local in nature. Although Maine undoubtedly has

[16]The Severance Pay Law not only interferes with the jurisdiction of the NLRB, but would likely enmesh the state court in interpreting and applying the existing collective bargaining agreement. Among the myriad issues which could arise are whether a contractual severance pay clause applies in the event of business termination and therefore constitutes an "express contract" in mitigation of the Severance Pay Law; which employees have been "employed" for three years, as that term is defined by the parties; whether the union had waived any claim to severance pay during negotiations; and what effect waiver would have on the right to claim statutory severance pay. Indeed, in this case the Maine Supreme Judicial Court determined whether the dispute was arbitrable. These issues are not to be determined in the context of state law. Instead, questions arising under a collective bargaining agreement must be determined exclusively by reference to federal law in actions brought either under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), or under the grievance and arbitration procedure in the bargaining agreement. *Allis-Chalmers* v. *Lueck*, 105 S.Ct. 1904. "State-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." *Id.*

an interest in accommodating the rights of employees and employers during a plant termination, that same accommodation has been made in the NLRA and cannot be regulated based on the State's generalized interest. The "local interest" exception so far has been applied only to controversies involving common law torts, where state law operates independent of labor relations issues. *See, e.g., Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (trespassory picketing); *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (intentional infliction of emotional distress); *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983) (injury to third parties by misrepresentations during a strike).

The Severance Pay Law invokes no exceptions. It must be preempted under *Garmon* and this Court's consistent protection of the primary jurisdiction of the NLRB to administer federal labor law.

III. The Maine Severance Pay Law Should Be Held Preempted By ERISA And The NLRA As A Matter Of National Industrial and Employment Relations Policy.

In 1986 eighteen state legislatures considered 38 separate bills concerning plant closings, relocations and reductions in force.[17] Three of those bills would provide mandatory severance pay.[18] Several of the bills would require continuation of health insurance plans at the employer's expense.[19] The Massachusetts legislature is considering amending its voluntary plant closing "compact" to make notice and severance pay provisions mandatory.[20] It is no exaggeration to predict that mass intrusion by the states into the federally-regulated arenas of welfare benefits and collective bargaining will be triggered by a signal that state regulation of those areas is permissible. Validation of the Maine Severance Pay Law would be that signal.

[17] "*Clearinghouse,*" Vol. 2, No. 15, August/September 1986. National Center On Occupational Readjustment, Inc.

[18] Illinois, H. 2665 and H. 2924; Missouri, H. 1128 & S. 601; West Virginia, S. 323.

[19] Illinois, H. 2924; Massachusetts S. 92 and H. 2952; Pennsylvania H. 793; New York, A. 10523.

A recent survey by the United States Department of Labor documents the potential impact of state intrusion on severance pay plans alone. Forty-five percent of employers with fifty (50) or more employees in professional, administrative, technical, clerical, or production classifications have severance pay plans.[21] If even some of those employers were compelled to have "express contracts" to be exempt from a statute such as Maine's Severance Pay Law, existing ERISA-covered plans for a significant number of employers and employees would be nullified. One more economic decision which employers traditionally have made on the basis of cost, benefits to be achieved and the competition within their industries will have been politicized and withdrawn from the business judgment arena.

If state-by-state regulation of welfare benefits were permitted, multi-state employers would have to cope with a plethora of severance pay and other welfare benefit requirements. One state law could exempt any employer with an express contract providing the benefit; another could exempt any company with a unilaterally adopted plan. Some states might tie the required benefit coverage to gross sales of the company, others to the gross wages paid by the company. Whatever the diverse requirements of state laws, a multi-state employer's ability to plan

[20] Massachusetts, S. 92 and H. 2952 (1986).

[21] U.S. Dept. of Labor, Bureau of Labor Statistics, July 1986, Bulletin 2262. Another study by the American Society for Personnel Administration suggests an even higher percentage, with 84.6% of those responding to the survey having such plans. *Most Firms Have Severance Pay Programs*, Resource, October 1986, p. 2.

its cost of operations or to base business decisions on the resources and markets available in any given location would be greatly complicated. The "crowning achievement" of ERISA, "eliminating the threat of conflicting and inconsistent state and local regulations,"[22] would also be gutted. The trade-off for many companies in accepting ERISA's stringent procedures and administrative safeguards, as well as the heavy cost of required funding, was the ability to plan according to one set of rules. With the loss of that ability many companies may eliminate or elect not to create pension welfare benefit plans.

It is reasonable and laudable that the states be concerned with the economic hardship that may result from plant closings. Indeed, many states currently have unemployment compensation insurance laws and training programs which aid displaced workers. The states' interest in plant closing protections, however, does not legitimize the establishment of state labor codes governing all aspects of the employment relationship. It would risk economic turmoil to permit states at this time to change wholesale the rules upon which employment relations have been planned and conducted. Multi-state companies, struggling both to recapitalize and to compete with well made and lower cost foreign products, simply cannot cope with the prospect of every state or local government establishing laws governing wages (including pension and welfare benefits), hours and conditions of employment.

In sum, Congress has declared our uniform and comprehensive national labor policy, and the nation's employers and employees have relied on those declarations. This Court should effectuate those policies and apply the well-established preemption principles of ERISA and NLRA in holding the Maine Severance Pay Law preempted.

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[22]Remarks of Sponsor Representative Dent, 120 Cong. Rec. 29197 (1974).

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted,

RICHARD G. MOON
(*Counsel of Record*)

LINDA D. MCGILL
JOHN H. RICH III
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza, P.O. Box 426
Portland, Maine 04112
(207) 774-2635

Counsel for Amicus Curiae

Of Counsel:

STEPHEN A. BOKAT
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

(18)

No. 86-341

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.
Appellant,

VS.

P. DANIEL COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS, MAINE DEPARTMENT OF LABOR, et al.,
Defendants.

On Appeal From the Maine Supreme Court

BRIEF FOR THE EMPLOYMENT LAW CENTER AND THE PLANT CLOSURES PROJECT AS AMICI CURIAE SUPPORTING AFFIRMANCE

JOAN M. GRAFF
ROBERT BARNES
JOHN M. TRUE
PATRICIA A. SHIU
THE EMPLOYMENT LAW CENTER
OF THE LEGAL AID SOCIETY
OF SAN FRANCISCO, INC.
1663 Mission Street
Suite 400
San Francisco, CA 94105
(415) 864-8848
JAMES EGGLESTON
MOCINE & EGGLESTON
1440 Broadway
Oakland, CA 94612
(415) 452-1300
Attorneys for Amici Curiae
Employment Law
Center and Plant
Closures Project

30 pp

QUESTIONS PRESENTED

1. Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts Section 625-B of Maine's Labor and Industry Code, 26 M.R.S.A. Section 625-B, which requires that certain employers which have terminated or relocated their operations provide specified severance benefits for employees under certain conditions.

2. Whether the National Labor Relations Act, as amended, 29 U.S.C. 141, *et seq.* preempts the above-described enactment.

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BRIEF OF THE EMPLOYMENT LAW CENTER AND THE PLANT CLOSURES PROJECT AS AMICI CURIAE

INTEREST OF AMICI

This *amicus curiae* brief is submitted by public advocacy and legal rights organizations whose interest is the protection and furtherance of the rights of employees and other individuals who suffer from the effects of plant closures and relocation. The consent of the parties to this filing has been obtained and filed with the Court. A brief description of the nature of the interest of *amici* is annexed hereto at Appendix A.

STATEMENT OF THE CASE

A. Background - The Problem Of Plant Closures

As American industry faces the challenge of competing effectively in a global economy, the pressures on wage earners in this country grow steadily more intense. In order to achieve and maintain a competitive edge, American manufacturers have become more flexible and mobile. Unprofitable manufacturing facilities today are quickly closed down or relocated, often without regard to the consequences for those left behind. Not surprisingly, this increased mobility exacts a terrible toll among U.S. workers and the communities in which they live. Job loss due to plant relocation or shutdown - a relatively rare phenomenon as late as a decade ago - is becoming increasingly common.

Between the years 1979 and 1984, for instance, 11.5 million workers in this country were displaced from employment as a result of plant relocation or closure. *Flaim, Displaced Workers of 1979-83: How Well Have They Fared?*, **Monthly Labor Review**, June 1985 at p. 3. (Cited hereafter as *Flaim, Displaced Workers)* Of these workers, 5.1 million had held the jobs they lost for a period of

three years or more. The median time on these lost jobs was 6.1 years. *Id.* Thus, the jobs lost were, in the main, "steady" occupations on which the wage-earner had come to rely as a source of income over a relatively lengthy period of time.

Moreover, once these jobs were gone they were not easy to replace. As of January 1, 1984 only 60% of these workers had been re-employed.[1] Twenty-five percent of the total were still seeking work, but a devastating 700,000 individuals had withdrawn from the workforce altogether. *U.S. Department of Labor, BLS Reports on Displaced Workers,* **Bureau of Labor Statistics News**, Nov. 30, 1984.

Even those who found work, however, were forced to make significant sacrifices. Almost one half of the total starting to work for another employer did so at a lower rate of pay. In manufacturing industries 40% of displaced workers who found new work did so for 20% or more below what they earned at the job they lost. *Flaim, Displaced Workers, supra,* at p. 11. Moreover, the jobs they found often lacked security. Obviously, as workers start out with a new employer they are more vulnerable to workforce contractions. Studies have shown that there is a far greater tendency for displaced workers to be the victims of further layoffs whether due to further plant closures or for other reasons. *Jarley, Response to Major Layoffs and Plant Closings: A Collection of Readings for Community Mental Health Agencies* (June 1980); *See also, Ferman & Gardner, Economic Deprivation, Social*

1 Those fortunate enough to secure other employment waited an average of six months before their next paycheck. Displaced workers more than 55 yeras old endured a longer wait -- 30 weeks on the average. *Flaim, Displaced Workers, supra,* at p. 4.

Mobility and Mental Health, **Mental Health And The Economy** (Dec. 1979).

The costs of plant closures do not stop at the plant gate. It has been thoroughly documented that for every manufacturing job lost due to plant closure or relocation, other positions dry up as well. Thus, both suppliers and customers of the relocating plant are forced to lay off workers. Also, other local businesses dependent in some part on the income produced in the form of wages must do the same. *Cipparone, Advance Notice of Plant Closings: Toward National Legislation,* 14 U.Mich.J.L.Ref. 283, 287 (1981). The "ripple effect" of a plant closure in a community which has grown up around that plant has been documented in a number of case studies. *See, eg. H.Rep. No. 336, 99th Cong., 1st Sess.* 9 (1985). For each job lost directly to a plant closure at least one more job is lost as an indirect result. In the State of Maine the ratio has been found to be roughly one and one third to one. *Folbre, Plant Closings and Their Regulation in Maine,* 37 Indus. & Lab. Rel. Rev. 185 (1984).

Nor are the costs only measured in lost wages. The social disruption and health consequences experienced by workers permanently displaced from their stable employment are staggering. It is well documented that displaced workers suffer from stress illnesses and stress related conditions at a much higher rate than average. *H.Rep. No. 336, 99th Cong., 1st Sess.* 7 (1985). Even the mortality rate of displaced workers has been found to be far higher than average. One study of the health effects of a plant closure on the laid off workers found the suicide rate to be *thirty times* greater than the average. *Cobb & Kasl, U.S. Dept. of Health, Education and Welfare Pub. No. 77-224, Termination: The Consequences of Job Loss* (1977). An increased suicide rate has been documented following closure of other plants as well. *See,*

H.Rep. No. 336, 99th Cong., 1st Sess. 8 (1985). Another study found the mortality rate among workers laid off from a brewery plant in the midwest to be *sixteen times* greater than the comparable rate for males in the same age distribution. *Id.* at 7. Additionally, the incidence of alcohol and drug abuse as well as family trauma such as child and spousal abuse, desertion and divorce has been documented to increase dramatically following a plant closure where the breadwinner remains unemployed for any length of time. *Id.*

These problems, of course, add to the burden of already overtaxed local social service agencies at the very time at which the communities' resources to meet these increased demands have been sharply cut due to the erosion of the tax base.

The state of Maine has, if anything, come in for more than its share of this scourge. During the decade between 1971 and 1981 a total of 107 plants in this relatively small state were reported closed. These closures resulted in the loss of 21,215 jobs centered mainly in Maine's basic industries. *Leighton, Plant Closings in Maine: Law and Reality,* **Plant Closing Legislation** (ed. A.Aboud, 1984). This figure, devasting by itself, does not take into account the incidence of job loss due to the "ripple effect" in the local communities where these plants closed. Using the multiplier noted above, the number of jobs lost in Maine during the relevant time was 49,219 - more than double the direct loss figure. *Id.* at p. 3. The burden on local public and private social service agencies has been greatly exacerbated by the circumstance that the closings were concentrated in the poorer counties of the state and in the lower wage industries with the harshest impact on women and minority workers. *Id.* at p. 4.

B. Legislative Response to the Plant Closure Problem

In response to this crisis, Maine, like other states and local governments, has seen fit to enact legislation designed primarily to mitigate the impact of a sudden, large scale plant closings on long term employees and their communities.[2]

In 1971 the Maine legislature amended the State's Labor and Industry Code by enacting the predecessor of the statute in dispute herein. As first passed, it provided for the payment of severance pay only when inadequate notice of the closing was given. *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A.,* 320 A.2d 247, 254 (ME. 1974)

In 1980 the severance provision was amended to its present form. It now provides for a minimum benefit

2 Five other states, Wisconsin, Michigan, Massachussetts, Maryland and Connecticut have passed laws having some regulatory effect on plant closures. The relevant provisions of these statutes are summarized briefly at Appendix B of this brief. In addition, at least three other states have enacted legislation authorizing studies of the plant closure problem. These include Nebraska, Rhode Island, and Virginia. *See, Summary of Federal and State Bills on Plant Closing Prepared by the National Center on Occupational Readjustment, Daily Labor Report No. 241* (Bureau of National Affairs, Dec. 14, 1986).

Also, some states have passed provisions the purpose of which is to give assistance to workers and communities attempting to purchase plants in danger of being closed. These include New York, Michigan, California, and Illinois, *Id.*

As is noted by the U.S. Chamber of Commerce in its brief herein, the problem of plant closures has been considered in one form or another in a total of eighteen states. (Brief of the U.S. Chamber of Commerce as *amicus curiae* at p. 26.)

(one week of pay for each year of service) only under the following conditions:

> (1) The employer must employ at least 100 persons. 26 M.R.S.A. Section 625-B(1)(A)
>
> (2) The employer must not otherwise provide severence benefits to employees under any kind of an "express contract." 26 M.R.S.A. Section 625-B(3)(B)
>
> (3) The closure or removal must not have been occasioned by a "physical calamity" which is defined to include an "adjudicated bankruptcy." 26 M.R.S.A. Section 625-B(3)(A)
>
> (4) The employee must have lost his job as a result of a "termination" or "relocation" of the employer's operations. 26 M.R.S.A. Section 625-B(1)(F) and (G)
>
> (5) The employee must have been employed by the employer for at least three years. 26 M.R.S.A. Section 625-B(3)(D)
>
> (6) The employee must not have transferred to a job with his employer at a new location. 26 M.R.S.A. Section 625-B(3)(C)[3]

The Maine Supreme Judicial Court, commenting on the legislative intent evident in this statute stated:

> The obvious intent of the Legislature in passing . . . the statute was to ameliorate the effects on a community when a large employer voluntarily goes out of business. The required payment of

3 For ease of reference the statute shall be referred to as the Maine Plant Closing Benefit Law or the Plant Closing Benefit Law.

> severence pay . . . would necessarily lessen the numbers of persons immediately needing welfare and other assistance from the community or State. It would also enable the affected worker to seek new employment, knowing that in the meantime he would receive at least some compensation after suddenly finding himself without work.

Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A., supra, 320 A.2d at 254.

C. The Proceedings Below

On May 23, 1981 Fort Halifax Packing Company (hereafter, "Ft. Halifax") closed its poultry processing and packaging plant in Winslow, Maine, which it had operated since 1972 when it purchased the plant from another food processor, Ralston Purina. Except for a few maintenance and clerical persons, Ft. Halifax laid off all of its more than 100 employees, some of whom had worked continuously at the plant for 20 years or more.

Ft. Halifax did not provide severance pay to any of the affected employees. At the time of the plant closing, many employees were covered by a union contract, but the agreement contained no provision for severance pay. Neither was there any other contract or agreement between Ft. Halifax and any of the affected employees regarding severance pay at the time of the layoffs.

On November 2, 1981 the Director of Maine's Bureau of Labor Standards commenced an action against Ft. Halifax, pursuant to Section 5 of the statute in dispute herein, 26 M.R.S.A. section 625-B(5), which authorizes the Director to bring an action to recover unpaid severance pay. The trial court rejected arguments, *inter alia*, that both ERISA and the NLRA preempted the Maine Plant Closure Benefit Law and on May 2, 1985 found Ft. Halifax liable for severance pay to over 80

employees. Ft. Halifax appealed to the Supreme Judicial Court of Maine, which made minor modifications to the amount of severance pay owed and affirmed the trial court judgment in all other respects on June 2, 1986. Its opinion is reported as *Director of Bureau of Labor Standards, et al. v. Fort Halifax Packing Company* at 510 A.2d 1054 (1986). Ft. Halifax seeks plenary review of the judgment against it in this Court.

SUMMARY OF ARGUMENT

A. ERISA Preemption

The Maine Legislature has grappled with the devastating effects of plant closure or plant shutdown on its citizens, local businesses, and communities by enacting the Plant Closing Benefit Law. Like other state laws which set minimal standards for wages, child labor, occupational health and safety, to name a few, the Plant Closing Benefit Law operates exclusively within an area of traditional state regulation which Congress has reserved to the states in spite of its regulation of pensions and other employee benefits under ERISA. The Plant Closing Benefit Law, which compels the payment of unemployment benefits to certain classes of displaced workers, is exempt from ERISA preemption under Section 4(b)(3), 29 U.S.C. Section 1003 (b)(3), which specifically exempts any employee benefit plan maintained solely for the purpose of complying with applicable unemployment compensation laws. Congress did not intend that ERISA preempt state policy decisions regarding the nature, application, and funding of unemployment compensation programs. This Court's decision in *Metropolitan Life Insurance Company v. Massachusetts*, __ U.S. __, 105 S.Ct. 2380 (1985) clearly states that this exemption from ERISA preemption is intended to be comprehensive in spite of a state law's innovative approach to a particular state concern. Accordingly, states

have been left free to establish their own unemployment programs in a manner which best suits the needs of the state and best addresses the particular nature of the unemployment at hand.

B. NLRA Preemption

The Maine Plant Closing Benefit Law is not preempted by the NLRA because the statute is a valid exercise of police power under which the state uses its broad authority to protect workers within the state. The purpose of the NLRA is to establish equality of bargaining power consonant with a state's substantial interest in preserving the health and welfare of its citizens. Exempt from the purview of the NLRA are those state laws which reflect such deeply rooted local feeling and responsibility that Congress could not have intended to deprive of the state of its power to act. The Maine Plant Closing Benefit Law clearly falls within this local interest exemption. Certainly, Congress did not intend to wipe out the myriad of state and federal worker protection statutes existing at the time the NLRA was enacted.

Nor does the Plant Closing Benefit Law impermissibly interfere in the collective bargaining process simply because severance pay is a mandatory subject of bargaining. On the contrary, the Plant Closing Benefit Law does not address itself to the collective bargaining process. Instead, "the free play of economic forces" will inevitably dictate the amount of severance pay. Consequently, there is no intrusion into federally regulated areas of welfare benefits and collective bargaining. The Maine Plant Closing Benefit Statute must therefore be upheld.

ARGUMENT

I.

SINCE THE MAINE PLANT CLOSING BENEFIT LAW COMPELS THE PAYMENT OF UNEMPLOYMENT BENEFITS, IT IS EXEMPT FROM ERISA PREEMPTION

A. Introduction

Ft. Halifax and supporting *amici* argue that since the Maine Plant Closing Benefit Law provides for "severance" pay, it is brought within the sweep of Section 514(a) of ERISA, 29 U.S.C. section 1144(a), which purports to preempt "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." (*See*, Brief For Appellant at p. 5) The Employment Law Center and the Plant Closures Project join in and adopt the State of Maine's arguments in opposition to this contention. Specifically, we join in the assertions that: (1) the obligations created by the Maine Plant Closing Benefit Law neither constitute a "plan," as defined by ERISA, nor "relate to" a plan within the meaning of that statute, (*See*, Motion of Appellee P. Daniel Coyne To Dismiss Or Affirm at pp. 7-9), and (2) the application of ERISA to the state law at issue here would have the anomalous result of allowing an employer with no obligations to its employees under ERISA to escape entirely its obligations under state law. (*See*, Motion at pp. 9, 10 and fn. 6, citing *Marcal Paper Mills v. Ewing*, 790 F.2d 195, 198 (1st Cir. 1986)(*Aldrich, J. concurring.*))

Further, we wish to elaborate on the argument made by the Appellee that the Maine Plant Closing Benefit Law is not preempted by ERISA due to the operation of Section 4(b)(3) thereof, 29 U.S.C. Section 1003 (b)(3), which specifically exempts from ERISA coverage any employee benefit plan maintained solely for the purpose of complying with applicable unemployment compensation laws. (*See*, Motion at p. 12, fn. 8.)

B. Congress Did Not Intend That ERISA Preempt State Policy Decisions Regarding the Nature, Application And Funding of Unemployment Compensation Programs.

The particular unemployment crisis targeted by Maine's Plant Closing Benefit Law is a matter of acute state and local concern. Maine chose to address this concern by exercising its traditional state police powers to provide unemployment benefits.[4] The Plant Closing Benefit Law operates exclusively within an area of traditional state regulation which Congress has expressly reserved to the states under ERISA Section 4(b)(3), 29 U.S.C. Section 1003(b)(3).

This Court has repeatedly cautioned that state regulation is not to be displaced by a federal program unless "Congress has unmistakably so ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Thus, Congressional preemptive intent should not be lightly inferred in the absence of explicit statutory language or clear and unambiguous legislative history. *See, e.g., Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

The broad Section 4(b)(3) exemption contains no limiting conditions or restrictions on the nature of the state's authority to operate free from ERISA preemption in the area of unemployment compensation. There is also noth-

4 Congress has long been sensitive to the importance of the state's interest in developing unemployment benefit programs. *See, New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 539 (1979).

ing in the legislative history of ERISA to suggest that the preemption exception for state unemployment compensation laws is more limited than indicated by its express terms. *See, Delta Airlines, Inc. v. Kramarsky*, 650 F.2d 1287, 1305 (2nd Cir. 1981), *aff'd. in part, vac. and rem. in part, Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). It must therefore be presumed that Congress intended to exempt from ERISA coverage employee benefit plans which are compelled by any type of state unemployment compensation law irrespective of the nature of the benefit provided by the law or the method of benefit funding. This construction is indicated because Congress did not intend ERISA to preempt such areas of traditional state regulation. *Metropolitan Life Insurance Company v. Massachusetts, supra*, 105 S. Ct. 2380.

In *Metropolitan Life* this Court considered the exclusion from ERISA preemption for state insurance laws found in Section 4(b)(2) of the statute, 29 U.S.C. Section 1144(b)(2). Like the exclusion for unemployment compensation laws at issue in this case, the State Insurance Law exemption from ERISA preemption contains no modifying limitations, does not purport to distinguish between traditional and innovative approaches to state regulation and is devoid of any suggestion that the exemption is intended to be anything less than total. As in this case, there is no legislative history suggesting that Congress had intended any such limitations in the expressly reserved area of traditional state regulation. Accordingly, the Court concluded that "[t]he presumption is against preemption, and we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope." *Id.* at p. 2390.

C. The Severance Benefit Required by Maine's Plant Closing Benefit Law Constitutes Unemployment Compensation Within The Meaning of Section 4(b)(3) of ERISA

Severance pay is generally viewed as an unemployment benefit in interpreting ERISA.

> Although severance pay is often a reward for past service, it also serves the same purpose as unemployment benefits. When ties that bind an employee to his or her company are severed by the employer, unemployment for the employee - whether fleeting or permanent, is an inexorable consequence. Thus, in our view severance pay is an unemployment benefit and an unfunded severance pay policy constitutes an "employee welfare benefit plan" under Section 1002(1)(A).

Gilbert v. Burlington Industries, Inc., 765 F.2d 320, 325, (2d Cir. 1985) *aff'd. mem.* __ U.S. __, 106 S.Ct. 3267 (1986). (Although the Second Circuit went on in this case to decide that ERISA preempted the plaintiffs' claims, there was no evidence that the severance pay therein was mandated by a state stautory scheme as is present here. Rather it was allegedly due pursuant to an employer personnel policy. *Id.* at p. 323.) An employer severence benefit plan which is intended at least in part to help employees during periods of unemployment which follow the elimination of their jobs, is considered an unemployment benefit as that term is used in ERISA. *Holland v. Burlington Industries*, 772 F.2d 1140, 1145 (4th Cir. 1985), *aff'd mem. sub. nom., Brooks v. Burlington Industries, Inc.*, __ U.S. __, 106 S.Ct. 3267 (1986). *See also, Jung v. FMC Corp.*, 755 F.2d 708, 710, fn. 2 (9th Cir. 1985); *Petrella v. N.L. Industries*, 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an unemployment

benefit"); *Sly v. P.R. Mallory and Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983).[5]

D. The Maine Plant Closing Law Is An Unemployment Enactment.

The Maine Plant Closing Benefit Law creates nothing more than a supplemental unemployment benefit, required to be paid to dislocated workers in order to address a particular feature of contemporary unemployment that is of special concern to the state[6]. As will be shown below, the statute clearly fits into the overall structure established by the state of Maine for unemployment relief (*infra* at p. 15-18) and it has been judicially viewed as an unemployment provision. (p. 19, *infra*)

5 Appellant and its supporting *amici concede* that severance benefits compelled by 26 M.R.S.A. Section 625-B are unemployment benefits within the meaning of ERISA. Indeed, this notion is the foundation of their argument that these severance benefits "relate to" an employee benefit plan covered by ERISA and are therefore preempted. (*See, e.g.*, Brief of United States as *amicus curiae* at p. 2).

6 In much the same manner, the New York legislature expanded the type of disability benefits required to be paid by employers to include certain pregnancy benefits when it passed Sections 200-242 of the New York Disability Benefits Law. (N.Y. Work. Comp. Law, Sections 200-242; McKinney 1965 and Supp. 1982-1983) This supplemental assistance, designed to address a special need recognized by the state legislature, was found to be within the broad exception to ERISA preemption for benefits required by a state disability insurance law in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

1. When The Plant Closure Benefit Law Is Read Together With Other Provisions of the Maine Labor and Industry Code It Is Clear That An Unemployment Benefit Was Intended.

Severance benefits mandated by the Plant Closing Benefit Law are an essential component of Maine's overall unemployment compensation scheme. Accordingly, they are classified as "wages" for purposes of determining eligibility for unemployment compensation. *See*, 26 M.R.S.A. Section 1043(19).[7] Eligibility for conventional unemployment compensation arises for any week during which a person is "unemployed," i.e., receiving no wages and performing no services. 26 M.R.S.A. Section 1043(17) and 1191.[8]. Since severance pay received under the Plant Closing Benefit Law constitutes "wages," a person receiving these benefits would not be considered "unemployed" during the period for which benefits were received, and therefore would not be eligible for un-

7 Section 1043 (19) defines "wages" as "all renumeration for personal services, including commissions, bonuses, *severance or terminal pay*, gratuities and the cash value of all renumeration in any medium other than cash." 26 M.R.S.A. Section 1043(19) (emphasis supplied).

8 Receipt of severance pay as "wages" operates in the same manner with respect to eligibility for and calculation of unemployment benefits for partial unemployment. 26 M.R.S.A. Sections 1043(1)(B) and 1191(3). An individual is deemed "partially employed" and ineligible for benefits for any week of partial unemployment in which "wages" received from any source are not more than $5.00 in excess of the total unemployment benefit. This disposes of the Solicitor General's ragument that the Plant Closing Benefit Law does not qualify as an unemployment compensaion law under ERISA Section 4(b)(3) because it does not require recipients to be unemployed (*See*, Brief of the United States as *amicus curiae*, p. 12 n.12)

eligible for unemployment compensation.[9] The statute also expressly disqualifies recipients of such severance pay from any award of unemployment compensation unless and until the severance pay is exhausted prior to securing other employment. 26 M.R.S.A. Section 1193(5)(A) (disqualification as "terminal pay"). This disqualification is consistent with the expressed intent of the sponsor of the 1973 predecessor of the current Plant Closing Benefit Law that severance benefits serve as a substitute for unemployment compensation until exhausted. (*See, 3 Maine Legislative Record,* 4093-94 (1973) (Statement of Rep. Farley)[10]

The Maine plant closing benefit law presumes that workers displaced by a large plant closing or relocation who are unable to transfer to comparable jobs at a new plant will suffer the special problems of "structural unemployment" the law seeks to remedy. Job loss occasioned by the permanent closure of large plants is essentially permanent; comparable replacement work is rarely available. Workers displaced by large plant closings inevitably suffer long periods of unemployment, broken only by sporadic temporary employment in low paying jobs. This job loss is not individually unique, but is endemic to entire industries and regions. Because of the "structural" nature of the unemployment caused by permanent plant closings, efforts by both federal and state governments to remedy the special effects of this problem have to date included programs to retrain "dislocated workers" and to provide supplemental unemployment benefits to support workers during the period of retraining to improve their chances of successful completion of the program. (*See, e.g.*, 26 M.R.S.A. Section 1196)

The Plant Closing Benefit Law targets "structural unemployment" and supports the retraining policy of the State of Maine for workers displaced by plant closings through the provision of supplemental assistance during a period of retraining and readjustment to a new occupation. The calculation of plant closing benefits on the

9 The period of "receipt of wages" for purposes of 26 M.R.S.A. Section 1043(17) presumably would be calculated on the number of weeks for which a displaced worker received plant closing severance benefits.

10 The Solicitor General incorrectly argues that receipt of the plant closing benefit increases the amount of conventional unemployment compensation due displaced workers. Severance compelled by the plant closing law is paid at the same weekly rate as the qualified employees' actual wages and therefore does not increase the rate at which other unemployment compensation benefits are paid. (*See, e.g.*, 26 M.R.S.A. Section 1191(2)) More important, receipt of severance pay under the plant closing law disqualifies the recipient for unemployment compensation during the period in which severance pay is received. The Solicitor General states "if severance pay was [sic] a substitute for unemployment compensation, it would decrease the amount owed." (Brief of the United States as *amicus curiae* at p. 16, fn. 12) Since receipt of plant closing benefits precludes eligibility for unemployment compensation, the Solicitor General presumably would concede these benefits are in fact a substitute for unemployment compensdation.

basis of yers of service is substantially related to the law's remedial objective because workers with longer tenure in a terminated industry and occupation are more likely to require a longer period of retraining and readjustment in order to find replacement work. This statute reflects a state policy decision that dislocated workers who are unlikely to find work in their former industry or occupation are in need of some minimal special assistance to ease the transition to new work.[11]

2. Judicial Interpretation of the Statute By The State of Maine Has Made It Clear That It Is Considered To Be An Unemployment Enactment.

Finally, the Maine Plant Closing Benefit Law has been recognized by the courts of the state as an unemployment enactment. This current statute reflects revisions of earlier Maine plant closing laws, which imposed similar severance benefit obligations on large employers in the case of permanent plant shutdown or relocation. The Maine Supreme Judicial Court has concluded that Maine's plant closing legislation represents a reasonable

11 The Chamber of Commerce argues that because the Maine Plant Closing Benefit Law does not meet the requirements of the Social Security Act, 42 U.S.C. Sections 501-503, for Federal financial assistance, the law must be preempted by ERISA. (Brief of the U.S. chamber of Commerce as *amicus curiae* at p. 13) Neither the Social Security Act nor ERISA require all state unemployment benefit laws to comply with the requirements for such assistance. Some states, like the state of Maine in this case, require employer funding of unemployment benefits wholly independent of and in addition to employer payments to a central insurance fund. *Delta Airlines v. Kramasky, supra*, 650 F.2d at p. 1305.

A state is vested with constitutional power to impose taxes on employers to alleviate unemployment. This independent constitutional authority is in no way limited by the state's contemporaneous participation in voluntary Federal assistance programs. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 308 (1943).

exercise of the state's police power because the law seeks, through advance notice and severance pay requirements, "to lessen the debilitating impact upon an area of the shutdown of a large business." *Shapiro Bros. Shoe Co. v. Lewiston-Auburn S.P.A.*, 320 A.2d at p. 255 By requiring severance pay on the occasion of a closing or relocation of a large plant, the statute "necessarily lessen[s] the numbers of persons immediately needing welfare and other assistance from the community or state." (320 A.2d at 254) The required severance pay benefits the affected worker in the same manner as the more conventional unemployment compensation benefit available in Maine (26 M.R.S.A. Section 1191) and other states by providing needed interim support for the worker and his or her family. It also lessens the burden on the state's unemployment compensation fund by operating as a substitute unemployment benefit.

E. Benefits Mandated Solely By Maine's Plant Closing Law Present No Possibility Of Interference With The ERISA Regulatory Scheme.

The special unemployment benefit required by the Plant Closing Law is no different than the special disability benefit required by the New York law at issue in *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. 85. Both represent special features of state laws which operate in areas of traditional state regulation, expressly reserved to the states by ERISA's Section 4(b)(3). 29 U.S.C. Section 1003(b)(3). In *Shaw*, the Court interpreted the state law exemption of Section 4(b)(3) as applying only to employee benefit plans maintained solely for compliance with state law. In order to escape ERISA preemption, the plan providing such benefits must operate as a separate administrative unit and provide only those benefits required by the applicable state law. (*Id.* at pp. 107-108)

In this case, severance benefits upon termination due to plant closing or relocation are required only in the complete absence of an employer plan providing for such benefits. 26 MRSA Section 625-B(3)(B) The Maine Plant Closing Law therefore requires a one-time payment of benefits only where an employer has wholly failed to establish and maintain a severance benefit program. Payments are limited to the state-compelled statutory benefits and only occur through an entirely independent administrative action. Thus, the Congressional intent to exempt plans "solely" maintained to comply with state social benefit laws will not be disrupted. *See, Delta Airlines v. Kramarsky, supra,* 650 F.2d at p. 1305.

Maine's "regulation" of severance benefits paid under compulsion of the Plant Closing Law presents no possibility of conflict or interference with federal regulation of severance plans under ERISA. ERISA does not apply until affirmative steps are taken toward severance plan implementation which bind the employer to benefits offered in the plan. *See, Donovan v. Dillingham,* 688 F.2d 1367, 1373 (11th Cir. 1982) When an employer takes such steps, the State of Maine then would withdraw from regulation because an agreement would have been established binding the employer to payment of severance benefits.

The specific purpose of the ERISA preemption provision was to eliminate the threat of conflicting and inconsistent state and local regulation. (Statement of Rep. Dent, 120 *Cong. Rec.* 29197 (1974)) Although ERISA was intended to preempt the field of benefit plan regulation, "[w]e cannot ignore the reality that when Congress enacted ERISA, 'federal exclusivity [was] a corallary of regulatory coverage, not an independent statutory goal.'" *Martori Brothers Distributors v. James-Massengale,* 781 F.2d 1349, 1359 (9th Cir. 1986), *amended* 791 F.2d 799

(9th Cir. 1986), *cert. denied,* No. 86-464 (11/10/86) [citations omitted] In this case, Appellant and *amici* essentially urge preemption as an independent statutory goal requiring blind preemption of special supplemental unemployment benefit programs, even in the absence of interference with the ERISA regulatory scheme or of any evidence of Congressional intent to restrict state authority in this area of traditional state regulation.

Congress has not unmistakably ordained preemption in this case, and in fact has expressly reserved to the states the broad authorityto operate freely in this field of traditional state regulation by way of conventional unemployment insurance programs, as well as innovative supplemental benefit programs to address particular state and local needs. If Appellants are successful in removing this supplemental unemployment benefit law from the broad exemption of ERISA Section 4(b)(3), the ERISA preemption mandate will eclipse the central purposes of the Act itself, and will intrude into areas of traditional state regulation in a manner wholly unintended by Congress.

II.

THE MAINE PLANT CLOSING BENEFIT LAW IS NOT PREEMPTED BY THE NLRA

A. Introduction

In the face of clearly contrary authority and with virtually no factual support, Appellant and the U.S. Chamber of Commerce argue that the Maine statute is preempted by

the NLRA[12] The doctrine of NLRA preemption prohibits state regulation in two areas: (1) those which have been intentionally left by Congress "to be controlled by the free play of ecomonic forces" between employers and unions, *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commissions,* 472 U.S. 132, 140 (1976), *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971), and (2) those which are intended to be the sole domain of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959)[13]

As we will demonstrate, however, the provisions of the Maine statute, the manner in which it has been applied in this case and the obvious dictates of the NLRA preemption doctrine make it clear beyond doubt that the statute is a valid exercise of police power pursuant to which states "possess broad authority . . . .to regulate the employment relationship to protect workers within the state." *Metropolitan Life Ins. Co. v. Massachusetts, supra,* 105 S.Ct. at p. 2398. *De Canas v. Bica,* 424 U.S. 351, 356 (1976).

12 The Solicitor General, however, concedes in his *amicus* brief that the NLRA has no such preemptive effect. (*See,* Brief of the United States as *amicus curiae* at pp. 8-10, fn. 6) We respectfully submit that the government was correct in abandoning this position.

13 Although Appellant does not clearly inform the Court which doctrine of NLRA preemption it seeks to assert, the U.S. Chamber of Commerce correctly distinguishes between these two theories, asserting that the Maine statute is preempted on both grounds. (*See,* Brief of the U.S. Chamber of Commerce at pp. 17-26.) The Chamber does not explain, however, the inconsistency inherent in arguing on the one hand that Maine's law interferes in an area specifically intended to be unregulated, ("free play" preemption) and on the other hand that the statute intrudes on an area specifically subject to the administrative control of the NLRB, ("*Garmon*" preemption).

B. The Maine Statute Does Not Costitute Impermissible Interference In the "Free Play of Economic Forces".

The argument of Ft. Halifax and the Chamber of Commerce that establishment of severance benefits for displaced workers by the State of Maine intrudes on the unregulable area which is supposed to exist between employer and union is based on the idea that severance pay is a "mandatory" subject of bargaining (*See,* authorities cited at Brief for Appellant, p. 19). Thus, they reason, parties to a collective bargaining relationship are obliged to negotiate in good faith concerning such an issue until and unless either agreement or impasse is reached. In the event of impasse either side becomes free to use economic self-help to achieve its objectives.

This argument has virtually no basis in the facts of this case. Like hundreds of state laws extending protections to workers, the Maine Plant Closing Benefits Law does not directly address itself to the collective bargaining process. It issues no command that either side make any concession in negotiations with the other. As this Court has observed,

> No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

Metropolitan Life Ins. Co. v. Massachusetts, supra, 105 S.Ct. at p. 2397. As the Court observed, a myriad of state and federal worker protection statutes were in existence at the time of the passage of the NLRA. There is

simply no evidence that Congress intended to wipe them out of existence when it legislated in the field of collective bargaining rights for employees. *Id.* at p. 2398.

Central to the holding of *Metropolitan Life* is the notion that minimal state labor standards which afford individual workers basic protections through, for example, mandated mental health benefits do not have any but the most indirect effect on the right to self-organization under Section 7 of the Act. 29 U.S.C. Section 157. Thus, they neither encourage nor discourage employees in the exercise of the rights guaranteed them by the statute. *Id.* at 2397. The Maine Plant Closing Benefit Law has a purpose very similar to the Massachusetts law: the protection of the individual workers in the state, both union and non-union, from the direct threat to the general health and welfare posed to them by a sudden plant closing. That plant closures result in economic dislocation which wreaks havoc on individuals and their families and on local businesses and communities has been documented *ante* at pp. 1-4, and noted by the Maine Supreme Judicial Court. *See, Shapiro Bros. Shoe Co., Inc. v. Lewison-Auburn S.P.A., supra*, 320 A.2d at p. 254. It is thus quite plain that the law is not one which seeks to restrain either employers or unions in any aspect of the economic warfare which sometimes takes place between them.

C. This Court's Ruling In *Metropolitan Life* is Dispositive in of Appellant's Arguments Herein.

Appellant points to two criteria of the Massachusetts statute which it asserts are the basis for the holding in *Metropolitan Life* and which distinguish it from the case at bar: (1) that the minimum standards required by the statute neither encourage nor discourage the collective bargaining process, and (2) that the minimum standards affect union and non-union employees alike. Neither of these features renders *Metropolitan Life* inapplicable here.

Although the Court considered the criteria noted above, they were in no way intended to be talismanic. In fact, the Court more broadly stated that mandated-benefit laws are not "designed to encourage or discourage" collective bargaining interests, but rather are "designed to give specific mimimum protections to individual workers to ensure that each employee covered by the Act would receive" the minimum benefit, regardless of what fruits the bargaining process might bear. *Id.* at 2397; *See also, Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). After thoroughly analyzing the role of the State in affording its citizens minimal standards of protection, the Court concluded that, for the purposes of preemption, "federal labor law . . . is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act. *Id.* at 2398.

Under the provisions of the Maine Plant Closing Benefit Law, employers remain free to fashion any type of severance plan they see fit. The sole constraint imposed by this statute rests on large companies which have failed to provide any type of severance benefit at all in the event of a plant closing. The minimum benefit required by the State in such an instance is designed to ensure that individual dislocated workers and their surrounding communities do not suffer major economic dislocation when a plant closes. The Statute operates without reference to the union or non-union status of the affected employees. Thus, the power of the State of Maine to provide such minimal protections to its individual citizens no more intrudes upon the economic balance of power than did the Massachusetts statute man-

dating minimum health insurance upheld by this Court in *Metropolitan Life, supra.*

Moreover, as the Solicitor General points out, "*any* minimum labor standards law grants employees rights that they do not have to bargain for, but this Court held in *Metropolitan Life* that such laws are not inconsistent with the provisions of the NLRA for that reason." (Brief of the United States as *amicus curiae* at p. 9, emphasis supplied). That employers may agree to less severance pay than is statutorily provided under the Maine law makes the statute *less,* rather than more, intrusive, on the bargaining process. *Id.*

Appellant's assertion that the Maine statute adversely affects union employers because non-union employers can unilaterally establish severance pay benefits which amount to less than is statutorily required is equally without merit. As noted by the Solicitor General, this merely illusrates the obvioius - that non-union employers

have greater freedom to set employment terms than their unionized counterparts. Union employers are still free to establish lower severance pay benefits than those statutorily required within the confines of the collective bargaining process.

Thus, as a legitimate and "unexceptional exercise" of the state's police power *(See, Metropolitan Life, supra,* 105 S.Ct. at 2399), the Maine statute in no way conflicts with the purposes of the NLRA. On these grounds the Maine Plant Closing Benefit Law is not preempted.[14]

III.

THE MAINE PLANT CLOSING BENEFIT LAW SHOULD BE PROTECTED FROM PREEMPTION AS A MATTER OF NATIONAL INDUSTRIAL AND EMPLOYMENT RELATIONS POLICY

The U.S. Chamber of Commerce raises the specter of "mass intrusion into the federally regulated arenas of wel-

14 The attempt by Appellant and the Chamber of Commerce to argue that the Maine Law is preempted under *San Diego Building Trades Council v. Garmon, supra,* is purely speculative and inapposite. The *Garman* doctrine only applies where a state seeks to regulate conduct expressly governed by the NLRA and where the state remedy exactly replicates that which the NLRB could provide. *Belknap Inc. v. Hale,* 463 U.S. 491, 511 (1983). Even then, the *Garmon* preemption rule is limited by the doctrine that a state may regulate "conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law." *Belknap Inc. v. Hale, supra,* 463 U.S. at p. 509. As has been thoroughly argued herein in connection with ERISA, the Maine statute is a clear expression of deeply rooted local concern. Moreover, it barely approaches the "periphery" of any matter encompassed by the NLRA. Even if the strained attempts by Appellant and the Chamber to conjure up the possibility that an unfair labor practice might somehow result from the application of the Maine statute were given some credence, the purely local nature of the state's interest removes the statute from the reach of NLRA preemption. *See, e.g. Linn v. Plant Guard Workers,* 383 U.S. 53 (1966).

fare benefits and collective bargaining triggered by a signal that state regulation of those areas is permissible." (Brief of U.S. Chamber of Commerce as *amicus curiae* at p. 27)

The Chamber's concern is unwarranted. Employers, particularly multi-state or multi-national employers, are already subject to a large number of state and local provisions which affect the manner in which business is done in a myriad of ways. It has long been recognized that states have the right to enact such provisions to protect their citizenry against the "economic turmoil" (See, Brief of the Chamber of Commerce at p. 28) created by the unfettered discretion of employers to make decisins such as to move from one location to another. To hold that the statute herein is not preempted will do nothing more than validate a narrowly crafted effort to lessen such economic turmoil without intruding into the domain of any regulatory power. Indeed it can only be considered sheer speculation to imagine that a statute as narrowly drawn as the Maine Plant Closing Benefit Law will have any debilitating effect on the admittedly robust "mighty oak of this Court's labor preemption doctrine which sweeps ever outward, though still totally uninformed by any express directive from Congress." *Golden State Transit Corp . v. City of Los Angeles,* __ U.S. __, 106 S.Ct. 1395 (1986) (Rehnquist, J. dissenting.)

It is respectfully submitted that the relatively recent and growing phenomenon of large-scale plant closure and relocation amply warrants protective actions by the states whose citizens bear their brunt. Particularly in the absence of a federal enactment in regard to plant closure, the preemption of state laws would unjustifiably leave large numbers of economically distressed employees with no remedy of any kind. To accomplish such a result in the name of the supremacy of certain federal laws -- ERISA and the NLRA -- which are supposed to be protective of employee rights in entirely unrelated areas would be ironic indeed. The Court is urged to prevent the misuse of the preemption doctrine to reach such an anomolous result.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be sustained.

Dated: January 30, 1987 Respectfully sumitted,

Joan M. Graff
Robert B. Barnes
John M. True
Patricia A. Shiu
(Counsel of Record)
The Employment Law Center
of the Legal Aid Society of
San Francisco, Inc.
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848

James Eggleston
Mocine and Eggleston
1440 Broadway, Suite 1000
Oakland, CA 94612
(415) 452-1300

Counsel for *Amici Curiae**

Counsel wish to gratefully acknowledge the assistance of Rina Hirai, Esq., Beth Ross, Carol Moor and Robin Bishop in the preparation of this brief.

APPENDIX A

Statement of Interest of the The Employment Law Center

The Employment Law Center is the principal project of the Legal Aid Society of San Francisco. The Legal Aid Society ("Society") and the Employment Law Center ("Center") share a long tradition of providing legal representation to the poor. The Society was founded in 1916 to provide counsel to those unable to afford it. Since then it has been firmly committed to representing the underrepresented.

The Center has pioneered in the employment law field for over a decade. It focuses on legal problems which affect disadvantaged people as they seek employment, and it represents those who find employment opportunities denied them for reasons other than their ability to do the job.

One of the major initiatives of the Center over the past five years has been enlarging the rights of unorganized workers, including those laid off as a result of management decisions to move jobs overseas, to discontinue certain types of work, and to shift work away from inner-city locations where jobs are desperately needed. The Center litigated *Carson v. Atari*, No. 530743, Santa Clara Cty. Super. Ct., filed Aug. 15, 1983, a class action lawsuit brought on behalf of over 500 workers who were permanently laid off without even one hour's notice. The lawsuit asserted, among other things, that California Labor Code Section 2922 requires actual, reasonable notice to employees who are laid off. The *Atari* case, as it is generally known around the country, thus sought to establish state law principles entitling workers to notice in the face of layoffs and plant closings. It did not, however, challenge the right of employers to close or

transfer business operations for reasons of business necessity. The case, which has been closely monitored around the country by plant closing activists as well as by the business community, was favorably settled close to trial.

The Center has also gained national prominence for several of its other cases on behalf of workers. Along with the State of California and numerous women's organizations throughout the country, it recently won a major victory in *California Federal Savings and Loan Association v. Guerra*, __ U.S. __, 55 U.S.L.W. 4077 (1986), in which this Court held that state pregnancy disability law was not preempted by the Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e (k).

The Center also has expertise in other areas pertaining to employee rights. In the area of sex discrimination, the Center has extensively litigated the rights of women to equal employment opportunities. In this regard the Center has appeared in this Court as *amicus curiae* on several occasions, including *Wygant v. Jackson Board of Education*, __ U.S. __, 54 U.S.L.W. 4479 (5/20/86) and *Meritor Savings Bank, FSB v. Vinson*, __ U.S. __, 54 U.S.L.W. 4703 (6/19/86).

In the area of discrimination on the basis of physical handicap, the Center has filed several *amicus* briefs, most recently, *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985), and *School Board of Nassau County v. Arline*, No. 85-1277, now pending before the Court.

Statement of Interest of the The Plant Closures Project

The Plant Closures Project is a coalition of religious organizations, community groups and labor unions established in 1981 to respond to the economic and social chaos caused by major plant closures. The project is

based in Alameda County, California, a county which suffered 95 plant closures resulting in the loss of 15,519 jobs between February, 1980 and May, 1983. These plant closings resulted into the loss of 38.2 jobs for every 1000 workers in Alameda County. [1]

The Plant Closures Project sponsors special education programs to increase public awareness of the problems of plant closures and economic dislocation and possible solutions to those problems. The Project provides special assistance to local governments and religious, community and labor groups throughout California in responding to specific plant shutdowns. These efforts have included special campaigns to obtain public and private economic development funds to help maintain plant operations under new owners, including employee ownership, as well as funding for retraining and other post-termination support programs for dislocated workers.

The Project also has been deeply involved in the development of state and local legislation designed to ameliorate the social and economic consequences of major plant closings, including a comprehensive plant closing ordinance in Vacaville, California, and advance notice provisions in San Jose, California. The Project continues to work towards enactment of a California plant closing law that would include provisions for advance notice and severance benefits similar to the plant closing law in effect in the State of Maine. A decision by this court invalidating the Maine Plant Closing Benefit Law would have a substantial chilling effect on the so far

1 California Employment Development Department, *Closed Businesses in California: February, 1980 to May, 1983* (Employment Data and Research Division, Labor Market Information Section OIG, June 10, 198

successful efforts the Plant Closures Project has engaged in to obtain both short term relief and long term solutions for workers and communities adversely affected by plant shut-downs.

APPENDIX B

State Plant Closing Laws

A. Michigan

Title: Mich. Comp. Laws Ann., Section 450.751 et. seq. (West Supp. 1979-80).

Type: Notice

Employers Covered: Voluntary

Requirements: Encourages businesses considering closing or relocating to give notice "as early as possible" to employees and their representatives, the Department of labor and the community.

B. Massachussets

Title: Mass. Ann. Laws Ch. 149, Section 182 (Michie/Law. Coop 1984-85).

Type: Notice

Employers Covered: Employers utilizing financing issues, insured or subsidized by a quasi-public agency of the Commonwealth must agree to accept voluntarily standards of corporate behavior.

Requirement: Covered employers are expected to provide affected employees with at least ninety days or the longest possible advance notice of a total or partial plant closing as well as to maintain such employees income and benefits for that period whenever possible.

C. Wisconsin

Title: Wis. Stat. Ann. Section 109.01 *et. seq.* (West Supp. 1984-85) - Mergers, Liquidations, Dispositions, Relocations, or Cessation of Operations Affecting Employees; Advance Notice Required.

Type: Notice

Employers Covered: Businesses or enterprises employing 100 or more persons whose decision to close afffects 10 or more employees.

Requirements: No less than 60 days written, advance notice of and other information about an employer's decision to effect a merger, liquidation, disposition orrelocation must be given to the Department of Labor, affected employees and their representatives, and the local municipality in which the affected facility is located.

Payroll, wages and other remuneration due affected employees must be disclosed to the Department of Labor. The Department may further require the employer to submit a plan setting forth the manner in which it intends to make final payments due its employees.

D. Maryland

Title: Maryland Code, Chap. 147

Type: Quick Response Program; Voluntary Guidelines

Covered Employers: Voluntary

Requirements: Voluntary guidelines establishing (a) the appropriate length of notice, (b) continuation of benefits, and (c) mechanisms through which employers can get assistance in implementing a closing for the purpose of mitigating the impact of a closing on workers, their communities and the employer.

Other provisions: On-site unemployment registration where more than 25 employees are affected; labor market and retraining information, job placement services and job search workshops.

E. Connecticut.

Title: Conn. Gen. Stat. Ann. Sec. 83 - 451 (West Appendix Pamphlet 1984) -

Health Insurance Extension.

Type: Benefit Protection

Covered Employers: Establishments employing 100 or more employees within 12 months prior to a closing or relocation.

Requirements: Covered employers must continue health insurance benefits for 120 days for employees affected by a plant closing or relocation or until the employee becomes eligible for other group coverage. Such employees are also entitled to an additional 39 weeks of coverage through the same provider at their own expense.

This requirement can be superceded by a provision in a collective bargaining agreement concerning the extension of health benefits following a plant closing or relocation.

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No. 86-341

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,
v.

P. DANIEL COYNE, Director, Bureau of Labor Standards Maine Department of Labor, *et al.*,
Appellees.

On Appeal from the Maine Supreme Judicial Court

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

MARSHA S. BERZON
177 Post Street, Suite 600
San Francisco, California 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 91 national and international labor organizations with a total membership of 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. Appellant contends, first, that the severance pay benefits mandated by the Maine plant-closing legislation here at issue are invalid under the very broad preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* This contention is wrong for two reasons.

A. First, ERISA § 514(a), 29 U.S.C. § 1144(a), preempts only state laws that "relate to any employee benefit plan," as such plans are defined in the Act.

ERISA's definition section applies the term "employee welfare benefit plan," the variant of "employee benefit plan" relevant here, only to "any plan, fund, or program . . . established or maintained by an employer . . ." § 3(1), 29 U.S.C. § 1002.1. The Maine Statute simply requires that if an employer terminates or relocates a plant (and if that employer has no express contract governing severance pay), affected employees must receive certain benefits. The Statute does *not* require that employers promise their employees such benefits, make plans in advance for funding such benefits, set the amount of such benefits, or establish a claims procedure for such benefits. While the Statute itself does establish some of these terms, insofar as it does so any "plan" is "established or maintained" not by an employer but by the state. In short, there *is*, contrary to the submission of the United States as *amicus curiae*, a difference of great legal significance between mandating payment of a benefit and mandating establishment of a benefit plan; that difference is explicit in ERISA's basic definitional section, and cannot be ignored.

B. The second reason the Maine plant-closing severance pay requirement is not preempted by ERISA is that if, contrary to our first submission, the Maine Statute does mandate that "plans" be established, those "plans" would be "maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . laws", within the meaning of ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). Under ERISA's preemption provision, there would therefore be no preemption.

It might at first blush appear that the term "unemployment compensation . . . laws" in § 4(b)(3) refers to the statutes enacted in every state to provide benefits for unemployed workers in conjunction with the federal Social Security Act. However, Congress could not possibly have intended to refer to those statutes in enacting § 4(b)(3); as many cases of this Court establish, the Social Security Act unemployment benefit statutes involve a *tax* upon employers, the creation of a *public* fund, and the payment of benefits as a purely governmental expenditure. As such, those statutes no more involve any "plan, fund or program established or maintained by an employer" than does any governmental program for making payments to eligible individuals out of public funds. Since there was therefore no reason to create an *exception* to ERISA coverage for public plans enacted through such laws, it is plain that Congress did not intend to do so in § 4(b)(3).

Rather, a consideration of the history of the relevant ERISA language demonstrates that what Congress had in mind in covering private unemployment benefit programs in ERISA § 3(1), as well as in excluding state-mandated plans of the same substantive type in § 4(b)(3), were supplemental unemployment compensation programs of the types developed by American industry beginning in the early 1950's. Those plans, and the federal tax statute governing such plans, recognize as one kind of benefit covered by the plan lump sum payments premised on permanent job loss. Those payments need not be integrated with the tax-supported unemployment insurance scheme nor must the plan set as a criteria for eligibility total unemployment after severance. Since the Maine planting closing law prescribes precisely such a benefit, it is an "unemployment compensation law" within the meaning of § 4(b)(3) of ERISA.

II. Appellant also maintains that the Maine plant-closing law cannot coexist with the National Labor Relations Act as amended, 29 U.S.C. § 141. This Court, however, in ***Metropolitan Life Insurance Co. v. Massachusetts***, 471 U.S. 724 (1985), decisively laid to rest the contention, made here again in barely disguised form,

that the states are precluded by the NLRA from setting minimum labor standards to protect their citizens. It adds nothing to the arguments rejected in *Metropolitan Life* to observe, as appellants do, that one consequence of this rule is that employers who reach an impasse with a union may not implement an otherwise illegal employment condition. The "right" of employers under the NLRA to make unilateral changes after impasse simply restores the employers' right to act without consulting the union, but does not confer any immunity from any other legal requirement. And, by permitting employees, union and nonunion, to enter into express contracts different from the Maine severance pay requirement, Maine is simply balancing its interest in protecting its citizens against their interest in ordering their own affairs. Such an accommodation, often struck in American jurisprudence, provides more, not less, room for the policy of free collective bargaining than does a mandatory statute.

ARGUMENT

I. THE MAINE PLANT-CLOSING STATUTE IS NOT PREEMPTED BY ERISA, BOTH BECAUSE MAINE DOES NOT REQUIRE EMPLOYERS TO ESTABLISH ANY "PLAN" COVERED BY ERISA AND BECAUSE THE BENEFITS MAINE REQUIRES EMPLOYERS TO PAY ARE WITHIN THE EXPRESS EXCEPTION TO ERISA PREEMPTION FOR PAYMENTS "SOLELY FOR THE PURPOSE OF COMPLYING WITH APPLICABLE . . . UNEMPLOYMENT COMPENSATION LAWS."

In *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), this Court summarized the pertinent structure of the Employee Retirement Income Security Act of 1974 ("ERISA") as follows:

> The federal Employee Retirement Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. 1001 et seq. (1976 ed. and Supp. V) subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. . . . The term "employee benefit plan" is defined as including both pension plans and welfare plans. The statute imposes participation, funding and vesting requirements on pension plans. 201-306, 29 U.S.C. 1051-1086 (1976 ed. and Supp. V). It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans. 101-111, 401-414, 29 U.S.C. 1101-1114 (1976 ed. and Supp. V). ERISA does not mandate that employers provide any particular benefits . . . .
>
> Section 514(a) of ERISA, 29 U.S.C. 1144(a), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. . . . [Section] 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), exempts from ERISA coverage employee benefits plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." [463 U.S. at 90-91 (footnotes omitted)].

Given this statutory scheme, the question whether the Maine plant-closing statute ("the Statute" or "the Maine Statute") here under attack was outlawed by Congress in passing ERISA is a question which can be approached via at least two routes. The first involves a determination whether the Maine Statute "relates to" any "employee welfare benefit plan" as the phrase in quotations is defined in ERISA § 3(1), 29 U.S.C. § 1002(1). We explain below why we agree with the Maine Supreme Judicial Court, but for reasons somewhat different than those of that court, that the Statute does not so "relate." Part (A), *infra*.

The other route to resolving the ERISA preemption question in this case, not addressed by the Maine court,

assumes, since there is under this approach no reason to decide, that the Maine Statute does prescribe an "employee welfare benefits plan", and does "relate to" that "plan" within the meaning of ERISA § 514(a), 29 U.S.C. § 1144(a). The question then becomes whether the "plan" to which the Statute relates is "maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . laws," within the meaning of ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3); if so, the Statute would then relate only to a "plan . . . exempt under section 1003(b) of this Title", and, under the express terms of ERISA § 514(a), there would not be preemption. As we show below (Part B, *infra*), given the overall structure of ERISA and the established use of the term "unemployment" benefits in the technical language of employee benefit practices generally, as well as in federal laws concerning such benefits, the conclusion that any "plan" established by virtue of the Maine Statute falls within the § 4(b)(3) exclusion is inescapable.

A. In following the first path of inquiry outlined above, the principal question comes down to what Congress meant by an "employee welfare benefit plan" in enacting ERISA.

The Maine Statute applies only to employers without an "express contract providing for severance pay." 26 M.S.R.A. § 625-B(3)(B). While the Maine Supreme Court declined to decide the precise reach of the "express contract" exclusion (Juris. St. App. A9, n.9), that court did indicate that, in general, that provision "eliminates state regulation if a plan covering severance pay *is created* by an employer or employee organization." Pet. App. A9. In any event, the employer in this case not only had no "express contract" covering severance pay, but no applicable provision at all for making payments to employees upon involuntary separation generally, or upon a plant closing particularly. Thus, the employer in this case is contending not that the Statute "relates to"

an employee benefit plan that the employer has "established or maintained", but that the Statute is preempted because Maine thereby requires the employer to establish or maintain a plan the employer would otherwise not have set up at all.

We may assume that if a state in terms required an employer to establish a program for paying ERISA-covered benefits, the complying program would indeed be an ERISA-covered plan, and the state law would "relate to" that plan within the meaning of ERISA § 514(a).[1]

[1] Whether this is true or not is not entirely clear. The interaction between the definition of "employee welfare benefit plan" in ERISA § 3(1) and the coverage exclusion in § 4(b)(3) of the Act indicates that at least a program that otherwise meets the statutory definition of "employee welfare benefit plan" does not escape that definition simply because the plan would not exist but for a state law requirement. For, as *Shaw v. Delta Airlines*, *supra*, stresses, § 4(b)(3) "[by] use of the word 'solely' demonstrates that the purpose of the entire plan must be to comply with an applicable [workmen's compensation, unemployment compensation, or disability insurance] law." 463 U.S. at 107. Since there would be no need to have the § 4(b)(3) exemption if the plans covered by the exemption would not otherwise be within the affirmative reach of the definitional sections of the Act, it must be true that "plans" maintained "solely for the purpose of complying" with a state law of a kind *not* enumerated in § 4(b)(3) of ERISA are within the affirmative reach of § (3)(1) of the Act. Thus, a plan established pursuant to a state law like the Hawaii statute in *Standard Oil v. Agsalud*, 663 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), (but not the Hawaii law itself, because of an exemption applying only to it, § 514(b)(5)), would fall within the affirmative reach of § 3(1) even though the employer established and maintained the "plan" in question not voluntarily but solely as a result of a state law requirement that such a "plan" be set up.

In such a situation, the preemption problem under ERISA § 514(a) then turns upon whether the very state law that requires the "plan" be established is one that "relates to" those "plans" which would not exist at all but for that state law. This Court's summary affirmance in *Standard Oil v. Agsalud*, as well as some language in *Shaw v. Delta Airlines* (463 U.S. at 99-100) suggest that the Court, albeit without explicit plenary attention to the problem, has indicated that the answer to this "chicken-and-egg"

For example, the Hawaii statute in *Standard Oil v. Agsalud*, *supra*, required that employers in the state cover their employees with "prepaid group health care plan[s]." H.R.S. § 393-11. Those "plans," in turn, had to consist of agreements, binding for at least a year, with medical groups, nonprofit organizations, or insurers willing to supply on an ongoing basis either direct medical care or reimbursement for the cost of medical care. H.R.S. §§ 393-3(6), (7); 393-12. Moreover, since the "plan" could only qualify as meeting the statutory requirements if certain "[r]equired health care benefits" (H.R.S. § 393-7) were provided, the Hawaii statute necessarily mandated that the "plan" set out the benefits that were available. In short, the Hawaii statute did not simply require that employers pay certain medical costs once incurred; Hawaii required that the employers in the state set up in advance a detailed program for paying those costs, and then abide by that program.

Given this assumption, the open issue is whether, in contrast, a simple requirement that an employer make certain payments to employees of a type referred to in the ERISA definition of "employee welfare benefit plan" [2] is

question is "yes." The Maine Supreme Court in this case, however, was of the view that the answer is "no". Juris. St. App. A8-A9 ("Because Maine's severance pay statute is operative only when a privately created benefit plan covering severance pay is not in existence, it does not have a "connection with or reference to" an employee benefit plan covered by ERISA and is thus not preempted by Section 1144.") There is no reason in this case to explore this particular metaphysical problem further. For, as we argue in the text, the statute in this case does *not* mandate any "plan"; what would be the case if a state were to do so is therefore not relevant.

[2] For reasons we explain below (*infra*, at pp. 22-25), it is clear that the kind of benefits provided by the Maine plant closing law are "benefits in the event of . . . unemployment", and are therefore of a substantive type covered by the ERISA definition of "employee welfare benefit plan." Whether those benefits are also included in the "employee welfare benefit plan" definition as a "benefit described in section 186(c) of this title"—namely, "pooled . . . severance pay benefits"—is therefore not relevant. *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 325-26 (2d Cir. 1985), *aff'd mem.* —— U.S. ——, 106 S. Ct. 326 (1986); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1145 (4th Cir. 1985), *aff'd mem. sub nom. Brooks v. Burlington Industries, Inc.*, 106 S. Ct. 3267 (1986) (both holding that severance benefits are "benefits in the event of . . . unemployment", but going on, unnecessarily, to hold as well that they are within ERISA coverage simply because they are severance pay benefits, without regard to whether they are "pooled" severance benefits.)

also a requirement that mandates a "plan" within ERISA's coverage.

We have no quarrel with the basic attributes of a "plan" articulated in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (en banc), relied on by appellant and its *amici curiae*; *viz.*, "a plan, fund, or program under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefit, the source of financing, and procedures for receiving benefits." 688 F.2d at 1373. But it is not sufficient to meet ERISA's definition of a plan that the Maine Statute sets out sufficient terms concerning the required payments that, if the employer itself had voluntarily communicated a promise to provide similar terms to employees, the employer would have established an "employer welfare benefit plan" under ERISA. *See Brief for the United States as Amicus Curiae Supporting Reversal* ("Gov. Br.") at 13-14. For there *is*, contrary to the United States' submission, a "legally significant difference between mandating the establishment of a plan and mandating the payment of a benefit." *Id.* at 14 n.10. That difference inheres directly in ERISA's definition of an "employee welfare benefit plan."

Under that definition, there is no "employee welfare benefit plan" in the technical sense that term is used in ERISA unless there is a "plan, fund, or program . . . *established or maintained by an employer*". ERISA

§ 3(1) (emphasis supplied). As the Department of Labor itself recognizes, neither every payment of a benefit of the types enumerated in ERISA §§ 3(1) and (2) nor every obligation to pay such a benefit constitutes the establishment or maintenance of an "employee benefit plan" within the meaning of those sections. For example, the Department recognized in the early days of the Act that "[a]n informal policy—where, for example, an employer states that as a general rule, no pay will be deducted from an employee's wages on account of occasional short absences—fails to rise to the level of a plan or program" and is therefore not covered by ERISA. Notice of Proposed Rulemaking, 40 Fed. Reg. 24642 (June 9, 1975). Similarly, early Department interpretations indicate that there is a distinction between an employer promise, as part of an employment contract, to pay certain covered benefits, and the "plan" for paying those benefits. *See* Opinion Letters cited in *Jervis v. Elerding*, 504 F. Supp. 606, 608 (C.D. Calif. 1980), as well as the *Jervis* opinion itself.

The precise line between an ERISA "plan" and the payment of a fringe benefit outside of any "plan" is, it is true, far from a bright one. *See, e.g., Gilbert v. Burlington Industries, Inc., supra*; *Holland v. Burlington Industries, Inc., supra.* At a minimum, however, the definition of the term "plan"—in particular, the requirement that the employer "establish or maintain" a "plan, fund or program" for paying benefits—suggests *something* beyond the ultimate payment of benefits by an employer, standing alone. *Donovan v. Dillingham, supra*, the principal lower court case upon which appellant and the United States rely as establishing the criteria for whether a "plan" has been established, so held:

> The Secretary contends that "establish" means no more than an ultimate decision by an employer or an employee organization to provide the type of benefits described in ERISA § 3(1), 29 U.S.C. § 1002(1). A decision to extend benefits is not the establishment of a plan or program. Acts or events that record, exemplify or implement the decision will be direct or circumstantial evidence that the decision has become reality—e.g., financing or arranging to finance the intended benefits, establishing a procedure for disbursing benefits, assuring employees that the plan or program exists—but it is the reality of a plan, fund, or program and *not the decision to extend certain benefits* that is determinative. [688 F.2d at 1373 (emphasis supplied).]

This view of the ERISA definition of "employee welfare benefit plan" comports with both the definition's language and its function in the statute as a whole. The terms "plan, fund or program" denote as a matter of plain language some scheme to pay benefits *in the future*, not simply the actual payment of such benefits when the triggering event occurs. And the phrase "established or maintained by an employer" requires quite clearly that it is the *employer*, and not some third party, governmental or otherwise, that must subscribe to that scheme, and define its parameters.[3]

Further, the function of the definition of "employee welfare benefit plan" in the statute is, of course, to trig-

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[3] This analysis is consistent with the approach taken by this Court in *Shaw v. Delta Airlines, supra.* In *Shaw*, the Court made clear that a "plan" within the meaning of ERISA § 4(b)(3) refers to "an administrative unit" for delivering benefits, and not simply to the benefits themselves:

> As the Court of Appeals recognized, § 4(b)(3) excludes "plans," not portions of plans from ERISA coverage . . . There is no reason to believe that Congress used the word "[employee benefit] plan" to refer to individual benefits offered by an employee benefit plan. [463 U.S. at 107.]

Since the term "employee benefit plan" in § 4(b)(3), as elsewhere in ERISA, is governed by the definition of that term in § 3(1), the same conclusion must follow with regard to the definitional sections. *See* § 3(3), 29 U.S.C. § 1002(3) (defining an "employee benefit plan" as, *inter alia*, "an employee welfare benefit plan").

ger a series of obligations on the part of the employer—in particular, reporting, disclosure, and fiduciary duty obligations—as well as the obligation, enforceable in federal court and governed by federal law, to pay benefits under the plan in accord with the plan's terms. *See* ERISA §§ 101-111, 402-410, 502, 29 U.S.C. §§ 1021-31, 1101-14, 1132. The overall function of these requirements is to provide clear information to potential beneficiaries in advance as to what they can expect to receive, and to assure that they do in fact receive what has been promised to them. Absent some form of advance commitment by an employer to pay certain benefits, there would be nothing to report or disclose in annual reports or summary plan descriptions as to what that commitment is (*see* § 101-103). And absent such an advance commitment of some kind, there is no meaning to such requirements as creating a "written instrument" governing the plan and describing "the basis upon which payments are made to and from the plan" (§ 402), and no basis for a lawsuit "to recover benefits due to [a participant or beneficiary] under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan" (§ 502(a)(1)(B)).

In this instance, the Maine Statute imposes only upon "[a]ny employer who relocates or terminates a covered establishment" a simple obligation to make separation payments to employees. M.R.S.A. § 625(2). There is no requirement that employers who have no present intention of closing or relocating establish in advance any plan for making the required payments should such a contingency occur, or for determining how such payments will be funded.[4] Nor is there any requirement that em-

[4] *Compare*, in this latter regard, the Hawaii statute in *Standard Oil v. Agsalud*, *supra*, at H.R.S. §§ 393-3(7), 393-12 and 393-13 (every employer must contract with either a medical group undertaking to provide direct medical services or a nonprofit organiza-

ployers assure their employees that such payments will be made should the establishment be relocated or terminated, or that the employer will set up any procedure for processing claims for payments.

Thus, if ERISA's reporting and disclosure requirements applied, there would be nothing to report or disclose in advance of the actual occurrence triggering the benefit payments. Nor could the fiduciary and enforcement aspects of ERISA meaningfully apply to the Maine Statute's bare benefit-payment requirement, since an employee's obligations would be judged solely by the terms of the Statute, and not in any sense by any plan separately (even if mandatorily) established or maintained by any employer.

In short, while the Maine Statute does impose upon terminating or relocating employers a responsibility to pay certain benefits, the Statute does *not* mandate that Maine employers generally "establish or maintain" any "plan, fund or program" for paying those benefits, or incorporate those benefits in any existing "plans," as those critical terms are used in ERISA. Consequently, the Statute does not "relate to" any ERISA covered plan, and is not preempted by ERISA.

B. The second statutory route to the conclusion that the Maine Statute is not preempted by ERISA is via the exemption to ERISA coverage, and therefore to ERISA preemption, created by the interaction between § 514(a) and § 4(b)(3) of the Act. The controlling question along this line of inquiry is whether the Maine Statute is an "applicable . . . unemployment compensation law" as that term is used in § 4(b)(3).

1. The "unemployment compensation" aspect of the ERISA § 4(3) coverage limitation is one which this Court has had no occasion to address. *Compare Shaw v.*

tion or insurer undertaking to defray medical expenses, and must pay at least one-half of the required premium for the coverage selected).

Delta Airlines, supra, (applying the "disability insurance" exception); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981) (applying the "workmen's compensation" exception). At first blush, it might seem that, as the *amici curiae* supporting appellant assume without investigation (Gov. Br. at 16 n.12; *Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant* at 13-14), the intent in enacting § 4(b)(3) must have been, at least primarily, to preserve from ERISA preemption the state laws passed as part of the program this Court has described as the "federal-state cooperative unemployment insurance programs . . . financed in part by grants from the United States pursuant to the Social Security Act, 42 U.S.C. §§ 501-503." *California Department of Human Resources v. Java*, 402 U.S. 121, 125 (1971).[6] However, both the function of § 4(b)(3) in ERISA as a whole and the legislative history of that section, considered in conjunction with the nature of the Social Security Act unemployment statutes, demonstrate that § 4(b)(3) could not possibly be meant to refer to those statutes.

As we have already seen (pp. 4-6, *supra*), § 4(b)(3) states an exclusion from ERISA coverage for plans that, but for the exclusion, would fall within the definition of "employee benefit plan" in § 3 of the Act. That definition refers to "any *plan, fund, or program* which was heretofore or is hereafter established or maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of . . . unemployment." (Emphasis supplied.)

Unless the Social Security Act unemployment laws would in some sense involve a "plan" fitting this definition but for the exclusion contained in § 4(b)(3) there would be no point in an exclusion from coverage for the

[6] For clarity, those state laws are hereafter referred to as "Social Security Act unemployment statutes".

program established by such laws. Therefore, the initial inquiry must be whether the federal-state cooperative program for paying unemployment benefits created by the Social Security Act comes within the definition of "employee benefit plan"—and specifically the definition of "employee welfare benefit plan"—under ERISA.

This Court had occasion in the early days of the Social Security Act to review the nature of the Social Security Act unemployment laws:

> [These statutes] set[] up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by [the statutes . . . . [They] impose[] on the employers the obligation to pay a certain percentage of their total monthly payrolls into the state Unemployment Compensation Fund. . . Benefits are payable from the fund to the employees covered by the Act, in the event of their unemployment, upon prescribed conditions and at prescribed rates. . . [C]ontributors to the state fund are entitled to credit their contributions in satisfactions of the tax imposed on employers by the Social Security Act, to the extent of 90 percent of the tax . . . [*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 505-08 (1937).]

While contributions to the state unemployment funds are made by employers and benefits from the funds are paid to employees, that connection does not alter the fact, fundamental to this Court's seminal decision in *Carmichael Coal* as well as to many later cases in this Court concerning the Social Security unemployment compensation system, that

> the contributions which [these Social Security unemployment statutes] exact[] of employers are excise taxes[,] . . . an exertion of the taxing power of the state. . . . [They have] all the indicia of a tax, and [are] of a type traditional in the history of Anglo-American legislation. [*Id.* at 508.]

As taxes, mandatory employment payments to the state unemployment funds are, like other taxes, "not an assessment of benefits [but] . . . [a] means of distributing the burden of the cost of government." *Id.* at 522. The funds produced by the state unemployment taxes are "public funds" (*id.* at 517), and the benefits paid from those taxes are paid for a "public purpose" (*id.* at 514-15.)

In short, as the Court stated in *Labor Board v. Gullett Gin*, 340 U.S. 361, 364 (1951):

> Payments of unemployment compensation [are] not made to employees by [employers] but by the state out of public funds derived from taxation. True, these taxes were paid by employers, and thus to some extent [each employer] helped to create the fund. However, . . . the payments to employees [are] not made to discharge any liability or obligation to [the employer] but to carry out a policy of social betterment for the benefit of the entire state.

Compare Gullett Gin's holding that benefits under a state unemployment compensation statute were not "direct" but 'collateral" benefits, and therefore did not have to be deducted from the back pay award an employer was ordered to pay in an unfair labor practice proceeding. *Id.* *See also California Department of Human Resources v. Java, supra*, 402 U.S. at 136 (Douglas, J., concurring); *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 534-35 (1979) (plurality opinion) ("unemployment benefits are not a form of direct compensation paid to strikers by their employer; they are disbursed from public funds to effectuate a public purpose. . . . [T]he employer-provided moneys are . . . . funneled through a public agency, mingled with other—and clearly public—funds, and imbued with a public purpose.") *Cf. California v. Grace Brethren Church*, 457 U.S. 393, 407 et seq. (1982) (because employer payments under Social Security unemployment compensation statutes are state

taxes, federal courts are without power to enjoin their payment.)

Thus, the programs established under Social Security Act unemployment benefit statutes do not involve a "plan, fund, or program . . . established or maintained by an employer." *Cf. Donovan v. Dillingham, supra*, 688 F.2d at 1372 and authorities cited. Rather, those programs were "established" and are "maintained" solely by the state and federal governments, using "public funds to effectuate a public purpose". *New York Telephone Co., supra*, 440 U.S. at 535. While employers as a group do provide the moneys ultimately disbursed as benefits, employers do so only as payment of a tax obligation. As such, employers have precisely the same relationship to unemployment benefits paid from employment taxes that taxpayers generally have to the many other public benefits—for example, welfare payments and medicaid benfits—that are paid to individuals for purposes also served by the private employee plans governed by ERISA. Just as none of those programs are affirmatively covered by ERISA,[6] so the programs established under Social Security Act state unemployment compensation statutes are also outside ERISA's purview entirely. That being the case, there is no reason Congress would have created an express exception from ERISA coverage for such laws.

The legislative history of the "unemployment compensation" aspect of § 4(b)(3), sparse thought it is, is consistent with this conclusion. The predecessor to ERISA, the

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[6] For example, it has never been contended, nor would such a contention be credible, that ERISA's reporting, disclosure, and fiduciary obligation provisions apply to employers with regard to their payment of state and federal taxes. Those taxes fund, for example, medicaid benefits for the medically needy. *See* 42 U.S.C. § 1391 *et seq.*; *see, e.g.*, Cal. Welf. & I Code § 14000 *et seq.* Yet, there is no exemption in ERISA, in § 4(b)(3) or elsewhere, for government-mandated health care programs.

Welfare and Pension Plans Disclosure Act ("WPPDA"), Pub. L. No. 85-836, 72 Stat. 997 (1958), contained, in § 4(b)(2) of that Act, a very similar exclusion to that now contained in ERISA § 4(b)(3). Thus, WPPDA § 4(b)(2) provided that the WPPDA.

> shall not apply to an employee welfare or pension benefit plan if . . . such plan was established and is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability laws.

The reason for including in WPPDA the § 4(b)(2) exception to mandatory federal reporting and disclosure requirements is quite clear: Congress' concern in developing WPPDA was with "private employee benefit plans." S. Rep. No. 1440, 85th Cong., 2d Sess. at 2 (1958); *see also id.* at 5, 6, 10. Congress was quite aware that there were in addition "various social insurance programs developed by the Federal Government, the State governments, or the two acting in cooperation," and was aware in particular that as to certain varieties of government-mandated social insurance programs, the state statutes permit employers to provide coverage not only through a "State fund" but, *also*, at the employer's option, "through insurance companies . . . or self-insurance." S. Rep. No. 1734, 84th Cong., 2d Sess. at 15-16 (1956). The "weakness, waste, abuses, and unnecessary losses to the beneficiaries" (*id.* at 10) with which Congress was concerned in enacting WPPDA were perceived to exist only with respect to *private, voluntary* employee benefit plans, and not with respect to *either* purely governmental, state funded programs or those plans established and financed directly by employers but required, and policed, by governmental social insurance laws. The WPPDA § 4(b)(2) exception was intended to encompass the two varieties of state laws existent at the time that established mandatory benefit programs but permitted employers to meet their obligations by estab-

lishing their own benefit programs, rather than only by contributing to a state-funded program.

This basic decision concerning the private benefit plans to be covered by this kind of federal legislation, and those to be excluded, was carried forward into ERISA. As passed by both the House and the Senate, what became ERISA § 4(b)(3) was identical to WPPDA § 4(b)(2), with the exception that the words "and is maintained" was added after "established" in the Senate bill, to parallel a similar change in ERISA's definition of "employee benefit plan" from that contained in the WPPDA. H.R. 4200, 93rd Cong., 1st Sess. (1973), § 503(h), reprinted in Senate Committee on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act of 1974* ("Leg. Hist.") (1976) at 2032; *see also id.*, § 502(b), Leg. Hist. at 2030; H.R. 2, 93rd Cong., 2d Sess. (1974), § 4(b)(3), Leg. Hist. at 3918; *see also id.* § 3(1), Leg. Hist. at 3902. In conference, however, the term "unemployment compensation disability insurance law" was changed, without explanation, to "unemployment compensation *or* disability insurance law." H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), 16 (§ 4(b)(3)), Leg. Hist. at 4291 (emphasis supplied); *see also id.* at 255, Leg. Hist. at 4522.

The effect of this change was to expand, in two ways, the options, outside of ERISA's purview, open to the states for providing mandatory benefits to employees through direct employer-provided benefit programs, rather than only through state-provided programs.[7] First, states

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[7] The conference report was also the first time that the ERISA preemption provision in its present very broad form surfaced. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 745 (1985). With that development, § 4(b)(3), like the insurance saving clause involved in *Metropolitan Life Ins. Co., supra*, took on much greater significance in the overall statutory scheme than previously: While, under the Senate and House bills,

could now mandate disability insurance without any linkage to any unemployment benefit program. Second, states now were assured the option of creating a third kind of government-mandated but not state-funded benefit program: one providing compensation for unemployment. There is, however, no indication that by adding an "or", Congress intended fundamentally to change the kinds of programs referred to in the § 4(b)(3) exception from *government-mandated but privately established and maintained plans* to tax-funded programs such as the Social Security Act unemployment insurance schemes.

2. The problem, then, becomes whether the Maine Statute here at issue—a variant of which was in effect at the time ERISA was passed, and was the subject of a case reported shortly before the ERISA conference bill was devised (*Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Association*, 320 A.2d 247, 250 n.3 (Maine S.J. Ct. 1974))—is the kind of law that *was* intended to be included within § 4(b)(3). The Maine plant-closing severance pay law is indubitably the same in *structure* as the other laws that remain valid because of ERISA's incorporation of the § 4(b)(3) exception in its preemption provision, § 514(a). Thus, like the workmen's compensation laws of many states and the disability laws of a few, the Maine Statute requires certain employers to pay specified benefits to employees meeting certain criteria.[8] Consequently, if the benefit required by the Statute is an "unemployment compensation" benefit, any "plan"

§ 4(b)(3) had served only to exempt government-mandated plans from the reporting, disclosure, and fiduciary exemption provisions of ERISA, under the conference bill § 4(b)(3) functioned as well as a major exception to the otherwise broad substantive preemptive reach of § 514(a).

[8] We repeat that we are assuming for purposes of this argument, although we do not believe it to be the case (*see* Part IA *supra*), that the benefits provided for in the Maine Statute do constitute an "employee welfare benefit plan" within the meaning of ERISA.

that might be required by the Statute would be within the § 4(b)(3) exception to ERISA.

Once again, the interaction between the affirmative coverage of ERISA as explicated in the definition of "employee welfare benefit plan", § 3(1) of the Act, and the exception contained in § 4(b)(3) is the best starting place for determining the status of the Maine Statute. For ERISA § 3(1) specifies as one of the types of benefits that bring a program within ERISA's coverage "benefits in the event of . . . unemployment." Absent some indication to the contrary, it would appear that Congress intended the "unemployment compensation" exception in § 4(b)(3) to cover benefits with same *substantive* characteristics as the "benefits in the event of . . . unemployment" that are within the affirmative coverage of the Act.

As with § 4(b)(3), the origin of the list of benefit types contained in ERISA § 3(1) lies in the similar WPPDA list.[9] That predecessor statute included, as wel-

[9] That list, in turn, may well have been derived from a similar list contained in § 302(c)(5) of the Taft-Hartley Act. As enacted in 1947, that statute permitted trust funds jointly trusteed by unions and employers for purposes of paying, "for the benefit of employees, their families and dependents, for medical and hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance or accident insurance." Pub. L. 101, 80th Cong. 1st Sess. (1947), § 302(c)(5), 61 Stat. 157-58 (1947). The "unemployment benefits" language was a late addition to the list; it was added in the conference report to the Senate language, with only the explanation that "[t]he conference agreement adopts the provisions of the Senate amendment with minor clarifying changes." H.R. 3020, 80th Cong. 1st Sess. (1947) § 302(c)(5), National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947* ("LMRA Hist.") at 281.

The only clue in the Taft-Hartley debates to the origin of this late addition is that Senator Morse during the Senate debates com-

fare benefit plans, programs providing for "medical, surgical, or hospital care or benefits, or benefits in the event of accident, disability, death or unemployment." Pub. L. No. 85-836, 85th Cong., 2nd Sess., 1958, § 3(1). The drafters of ERISA began with that same list and added other enumerated types of benefits as well as "any benefit described in [§ 302(c) of the Taft-Hartley Act] (other than pensions on retirement or death, or insurance to provide such pensions.)" ERISA § 3(1), 29 U.S.C. § 1002(1). *See, e.g.*, S. Rep. No. 93-127, 93rd Cong., 1st Sess. 49, Leg. Hist. at 635 (using, in the Senate bill as reported by the Labor and Public Welfare Committee, the text of the WPPDA definition of "employee welfare benefit plan", with an amendment for Taft-Hartley plans).

The reason "benefits in the event of . . . unemployment" were included in the WPPDA is clear from the legislative history of that statute: The intention was to cover "[t]he relatively new supplementary unemployment-benefit ["SUB"] plans [that] complement the Federal-State program of unemployment insurance."

plained about the exclusion of unemployment benefits from the Senate list, and noted that David Dubinsky, the president of the International Ladies' Garment Workers' Union had noted the exclusion in his testimony on the bill. 93 Cong. Rec. 4882 (May 8, 1947) (remarks of Sen. Morse). In that testimony, Mr. Dubinsky did not refer to any particular unemployment benefit plans already existing. He did, however, note that the same private funding mechanism applied to pooled vacation payments "proved sufficiently workable and effective to justify its extension to other health and welfare services and unemployment benefits", and noted that "our industries are known for the irregularity of employment. Employers are small and . . . turnover is large. . . By the end of [the employees'] work year . . . their employer may be out of business." Hearings Before the Senate Committee on Labor and Public Welfare, Feb. 25, 1947, Statement of David Dubinsky. Thus, it appears that Congress added the "unemployment benefits" terminology precisely to permit experimentation with union-management negotiated solutions to job loss, including job loss due to plant closings.

S. Rep. No. 1440, 85th Cong., 2nd Sess. (1958) at 6; *see also* 104 Cong. Rec. 16425 (Aug. 6, 1958) (remarks of Rep. Perkins and Rep. Bosch) ("supplemental unemployment insurance" is one of the kinds of plans covered by the bill). It is therefore helpful, in determining the kinds of benefits that come within the "benefits in the event of . . . unemployment" language, to consider the nature of SUB plans as those plans have developed in American industry.

The early history of the private supplemental unemployment insurance plans was summarized in a Labor Department publication in 1965:

> Income security protection became an important issue in collective bargaining in the early 1950's, when a concerted effort was made by several unions for such protection via guaranteed annual wage or employment plans. The end result of this drive was the establishment of supplemental unemployment benefit plans. The first SUB plan was negotiated by Ford Motor Co. and the [UAW] in mid-1955. [United States Department of Labor, *Supplemental Unemployment Benefit Plans and Wage-Employment Guarantees*, Bulletin No. 1425-3 (1965), at 1.]

As part of the "income security protection" provided by SUB plans, many such plans came to include, and still include, not only weekly benefits to supplement the tax-funded benefits available to those temporarily out of work but, as well, "separation pay for laid-off workers whose employment terminated". *Id.* at 8.[10] By 1965, "[SUB] plans with nearly two-thirds of the coverage provided

[10] *See* Bureau of National Affairs, *Collective Bargaining Negotiations & Contracts* at 53:601, "Supplemental Unemployment Benefit Plans". For an example of a recently-negotiated SUB plan that include a severance payment not dependent upon lack of employment or receipt of tax-funded unemployment insurance benefits, *see id.* at 53:621 (Ideal Basic Industries, Inc. and Cement Workers, providing either a lump sum "termination benefit" or a weekly "layoff benefit").

separation pay." *Id.* Separation payments are often based, as in the Maine Statute, on a formula taking into account the number of years worked. *Id.* at 29. Unlike eligibility for the weekly temporary unemployment benefits, under SUB plans, eligibility for severance, separation or termination benefits is *not* typically based in any way on the claimant being without a job, or upon eligibility for tax-funded unemployed benefits. *Compare id.* at 17-19 with *id.* at 27-31.

Thus, the "income security" benefits provided by the supplemental unemployment benefit plans covered by the WPPDA and, later, by ERISA provide protection not only from temporary unemployment, but, as well, protection in the form of lump sum payments, based often on longevity of employment, from the dislocation necessarily caused by permanent loss of a job.[11] Indeed, since 1960,

[11] A recent Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation summarizes the nature of the injury caused by permanent loss of employment, regardless of whether the affected individual remains without any work at all:

> Worker dislocation constitutes a markedly different kind of unemployment in many respects. Many displaced workers have had long periods of attachment to their employers. Frequently the jobs lost have been achieved after working many years for a single employer, and workers often have difficulty in finding jobs that pay as much at the outset, or are comparable in other ways. Displaced workers often experience significant personal adjustments in moving to new employment and new occupations, and in some cases to new locations. [Bureau of National Affairs, *Daily Labor Report*, Jan. 13, 1987, at D-1.]

The Bureau of Labor Statistics defines displaced workers as "persons who lost their job due to plant closing, slack work, or position or job abolished, and who had significant attachment to their former positions (at least three years tenure)." *Id.* at D-5. While the harm suffered by displaced workers goes beyond simply not having some job, in fact such workers typically go without work for significant periods of time—a median of 18.3 weeks in one study. *Id.* at D-5. Indeed, "[c]ompared to the workforce as a whole, displaced workers endure a significantly longer duration of

federal tax law has recognized the broad nature of supplemental unemployment benefits, defining "supplemental unemployment compensation benefits" as

> benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the *discontinuance of a plant or operation*, or other similar conditions. [26 U.S.C. § 501(c)(17) (emphasis supplied).]

This definition, like the plans it was designed to accommodate, confirms that the terms "unemployment benefits" and "unemployment compensation" are technical terms that are properly applied, and were properly applied in 1974, to benefits precisely like those mandated by the Maine Statute; *viz.*, benefits payable on account of permanent job loss due to plant termination or relocation, regardless of whether the benefits: are paid in a lump sum or weekly; are integrated with the tax-supported unemployment insurance system or not; and are paid, under the applicable eligibility criteria, to the affected individual without regard to whether that individual has secured other gainful employment at the time of the receipt of benefits.

In sum, the Maine plant-closing statute is an "applicable . . . unemployment compensation law" within the meaning of ERISA § 4(b)(3). Therefore, if that Statute *does* "relate to" any "employee benefit plan", under the plain language of ERISA § 514(a) that "plan" is "exempt under [§ 4(b)(3)] of this Title", and there is no preemption by ERISA.

unemployment." *Id.* at D-6. And, once reemployed, displaced workers "showed average real earnings losses of 10 to 15 percent," with a significant percentage showing losses of 25 percent or more. *Id.* In short, permanent loss of employment is a form of "unemployment" that has personal income security consequences that usually include, but often go beyond, simply being out of work.

II. THE MAINE PLANT-CLOSING SEVERANCE PAY REQUIREMENT IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The second argument appellant makes in support of its contention that Maine may not protect employees, and their communities, to some degree from the economic injury caused by closing or relocating large plants can be dealt with in short compass. The argument that the National Labor Relations Act, as amended, precludes Maine from enacting this protective legislation is refuted by this Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts, supra.*

We begin from the proposition that *Metropolitan Life Insurance Co.*, squarely holds that the states may mandate the payment of a specified severance allowance by all employers meeting certain criteria. Such a statute would be nothing more than a "state . . . [regulation] that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements" in order to "'give specific minimum protections to *individual* workers.'" 471 U.S. at 754-55.[12]

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[12] There may, in other circumstances, be a substantial question whether a given state regulation is one which indeed sets "minimal labor standards" (471 U.S. at 755) or one which instead so constricts the terms of a collective bargaining agreement that *any* meaningful bargaining on a mandatory subject of bargaining is precluded. *See, Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959). Similarly, some state labor standards, while setting "minimum" standards with respect to some employees, may function as "maximum" standards for others. This could be the case, for example, if a state attempted to set standards governing the functioning of seniority systems.

In our view, either of these situations might well test the limits of *Metropolitan Life* and support a holding that there is, indeed, NLRA preemption. Because the statute in this case leaves wide leeway for collective bargaining and is incapable of setting a maximum, rather than a minimum, employment standard, there is no reason to determine how the holding and reasoning of *Metropolitan Life* would apply if either of those circumstances did obtain.

Such a statute would, of course, have an effect on the collective bargaining process: The union would no longer have to bargain to obtain the state-specified plant-closing benefits, and could therefore use its bargaining power toward another end. To that degree, such a statute "grants the union a bargaining chip." Brief for Appellant at 21. But, as *Metropolitan Life* stressed, bargaining *generally* takes place against "'the backdrop of state law.'" 471 U.S. at 757. Thus, employers, for example, come to the bargaining table with such formidable "chips" as the common law right to control and manage the use of their property as the employer sees fit, including, for example, the right to assign work tasks and to set the hours the premises will be open. Unions may negotiate about such matters but, failing a management concession, the "backdrop of state law" will remain in place, and management's right to govern the workplace as management wishes (subject, of course, to state health and safety laws, federal minimum wage and antidiscrimination laws, and so on) will remain intact. Thus, the holding of *Metropolitan Life* merely recognizes that the states have the power to grant *employees*, as well as employers, individual rights on matters that constitute mandatory subjects of bargaining.

Nor is there any question that, under the holding of *Metropolitan Life*, state minimum labor standards govern during a bargaining impasse as well as at any other time. It is true, of course, that the employer ordinarily may, under the NLRA, change employment conditions once the employer has discharged entirely his obligation under the NLRA to bargain collectively. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). But that principle merely restores to employers the workplace governance rights that obtain in the situations in which the employees have not selected a collective bargaining representative. Nothing in the NLRA's impasse doctrine grants employers a federal unilateral right to implement terms and conditions of employment that are contrary to state labor pro-

tective laws; rather, the impasse doctrine simply removes the obligation to consult with the union before acting in an otherwise legal fashion.

Appellant contends, however, that Maine somehow ran afoul of the national labor policy by determining that rather than dictating a single policy applicable to all employers and employees, the state would allow employers and employees, union or nonunion, to contract out of the state-set plant-closing benefits. Clearly, such a system has a less intrusive impact upon the bargaining process than a system of labor protections that does not permit waivers : the weight of the union's "bargaining chip" is diminished by the fact that the state mandated standard can be bargained down as well as up. Because the parties *are* "permitted to set . . . a lower [benefit] level than that mandated by state law" (*Metropolitan Life*, 471 U.S. at 751), the parties have more room to frame their terms and conditions of employment to meet their particular needs than if only bargaining up is permitted.

Nor does the fact that the severance pay right granted by the state is waivable in any way suggest that the state's interest in conveying that right is not a bona fide concern for the individual employees' well-being. Many important individual rights created by constitutional and statutory law are waivable by the individuals upon whom they are conferred, or their representative. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458 (1938); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The reason is that, as here, the interest in protecting individuals against exploitation must often be balanced against the value of allowing individuals to order their own affairs. This balance is often struck by conferring rights upon individuals, and then allowing those individuals to make the choice whether they would rather retain, or give up for something else, the right so granted.

Finally, the Maine Statute, with its accommodation for bargained alternatives, has no different effect upon the

ability of employers to make unilateral changes than would a mandatory, nonwaivable plant-closing severance pay statute. It is true that absent agreement from the union, an employer in Maine may not unilaterally implement a separation pay policy applicable upon plant-closing different from that mandated by the state. But under a statute setting mandatory, nonwaivable standards, the employer would also have been precluded from making a unilateral change that ignores the state's severance pay requirement.[13] Thus, while the waivability feature may be of no aid to an employer in an impasse situation, it is no hinderance either.

In short, the "express contract" exclusion in the Maine Statute does not burden the collective bargaining process established by the NLRA more substantially than would an inflexible, mandatory requirement that all employers provide specified plant-closing benefits. Rather, by allowing employers and employees to construct a form of protection different from that prescribed by the state, the Statute functions in much the same way as the remainder of the "backdrop of state law" against which collective bargaining occurs; *viz.*, the Statute confers certain rights upon one party to the federal bargaining process—in this instance, employees rather than employers—but then allows the employer and the union to go forward with only the constraint that any waiver of the state-conferred rights must be express and intentional. Since this is how the federal bargaining process interacts with such state-conferred rights as the employers' right to manage its property (and with the individual rights conferred by the NLRA itself (*see, e.g., Metropolitan Edison Co. v.*

[13] Actually, the unilateral change scenario posited by appellant and its *amici curiae* is so hypothetical as to be nearly impossible to imagine. Apparently, the notion is that some employer who is about to close his plant but is nonetheless engaged in negotiations for a new contract would seek unilaterally to implement a severance pay policy when the plant closed, as a weapon toward the end of obtaining a better contract for his now closed plant.

NLRB, supra)), the argument that the Maine Statute is preempted by th϶ NLRA is without any substance.

CONCLUSION

For the reasons stated above, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

MARSHA S. BERZON
ALTSHULER & BERZON
177 Post Street, Suite 600
San Francisco, California 94108
(415) 421-7151

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390